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Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of

JOHN PATRICK FAY, also known as JOHN P. FAY,

Deceased,

VIOLET JOSEPHINE FAY BUCK,

Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,

Appellees,

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

JURISDICTIONAL STATEMENT

Appeal from the Court of Appeals of the State of New York.

Pursuant to the Supreme Court Rules 13, par. 2, and 15, pars. 1 & 2, the appellant above named files this, her Jurisdictional Statement, on which she contends the Supreme Court of the United States has appellate jurisdiction to review on appeal the final judgment appealed from herein.

OPINIONS OF THE STATE COURTS

The opinion of the New York Court of Appeals, set forth in Appendix A, is reported in 44 N.Y.2d —, — N.E.2d —, — New York Supp. 2d —; the opinion of the Appellate Division of the New York Supreme Court, First Department, is reported in 55 A.D.2d 541 (12), 389 New York Supp. 2d 793; and the opinion of the Surrogate Judge of the Surrogate's Court, New York County, is unreported.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

1. The appeal herein is from a final judgment of the Court of Appeals of the State of New York, wherein and whereby appellant's objections and claim of entitlement to an inheritance in intestacy in an intermediate accounting proceeding instituted by the Public Administrator of New York County in the Surrogate's Court of New York County were dismissed.

2. The final judgment sought to be reviewed was made and entered on the 29th day of March, 1978. The notice of appeal was served on the attorneys for all the appellees and filed in the Surrogate's Court, New York County, on the 25th day of April, 1978. A copy of the final judgment is in Appendix B. A copy of the notice of appeal is in Appendix C.

3. The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of the appeal is section 1257 (2) of Title 28 of the *United States Code*.

4. Cases believed to sustain jurisdiction are: *Trimble* v. *Gordon*, 430 U.S. 762, *Lalli* v. *Lalli*, 431 U.S. 911, *Pendleton* v. *Pendleton*, 431 U.S. 911, *Schanefelt* v. *Paradiso*, 431 U.S. 911, *Reed* v. *Reed*, 404 U.S. 71.

5. The statute of the State of New York, the validity of which is involved by appellant's challenge of unconstitutionality, is *Estates, Powers* and *Trusts Law*, hereinafter referred to as EPTL, § 4-1.2(b), which provides:

> If an illegitimate child dies, his surviving spouse, issue, mother, *maternal kindred* and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2). (Emphasis supplied.)

MATERIAL STATUTES INVOLVED

EPTL 4-1.2 (17B, McKinney's Consolidated Laws of New York, pp. 531-532), effective Sept. 1, 1967, reads in pertinent part:

> § 4-1.2 *Inheritance by or from illegitimate persons*
>
> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> . . . . .
>
> (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of

administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

EPTL 4-1.1 (17B McKinney's Consolidated Laws of New York, pp. 476-477), effective Sept. 1, 1967, as last amended L. 1974, c. 903, reads in pertinent part:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

. . . . . .

(7) Brothers or sisters or their issue, and no spouse, issue or parent, the whole to the brothers or sisters or to their issue per stirpes.

. . . . . .

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

. . . . . .

Excerpt from "An Act for the Better Registration of Births, Deaths and Marriages in Scotland [7th August 1854]" (17° & 18° Vict. c. 80), printed in London by George Edward Eyre and William Spottiswoode, Printers to the Queen's Most Excellent Majesty (1854):

XXXV. In the Case of an illegitimate Child it shall not be lawful for the Registrar to enter the Name of any Person as the Father of such Child, unless at the joint Request of the Mother and of the Person acknowledging himself to be the

Father of such Child, and who shall in such Case sign the Register as Informant along with the Mother: . . .

(From record before New York Court of Appeals, Supplementary Appendix on Appeal, pp. 585-586).

MATERIAL SCOTTISH REGULATION INVOLVED

Excerpt from the "Regulations for The Duties of Registrars of Births, Deaths and Marriages, and of Assistant-Registrars, made and approved in pursuance of the Act for the Better Registration of Births, Deaths, and Marriages in Scotland (17° & 18° Vict. c. 80), July 1869, printed by Murray and Gibb, Edinburgh, for the Registrar of Births, Deaths and Marriages:

Illegitimate Children.

In the case of an *illegitimate* child, the Registrar must not enter the name of any person as the father, unless at the joint *personal* request of the mother and of the person acknowledging himself to be the father, who, under these circumstances, shall sign the Register, as informant, along with the mother, and shall be registered as the father, the word ILLEGITIMATE being added to the child's name. . . . (Italicization and capitalization in original; p. 14).

(From the record before New York Court of Appeals, Supplementary Appendix on Appeal, p. 14).

CONSTITUTIONAL PROVISION INVOKED BY APPELLANT

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Constitution, Amend. XIV, sec. 1)

QUESTIONS PRESENTED BY THE APPEAL

1. Does EPTL 4-1.2(b) as written, interpreted by the New York State Court of Appeals and as applied to appellant, requiring a judicial order of filiation during the lifetime of appellant's father as the exclusive precondition for inheritance from her half-brother, a formally acknowledged illegitimate, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

2. Does EPTL 4-1.2(b), as written, interpreted by the New York State Court of Appeals and as applied to appellant, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by denying to her, as a half-sister of the acknowledged illegitimate decedent, solely because she is of the *paternal* kindred, the right to inherit from him; notwithstanding, for the purposes of inheritance in intestacy, she is similarly circumstanced in EPTL 4-1.1(a)(7)([d]) with *maternal* kindred who take absolutely in EPTL 4-1.2(b)?

PREFACE TO STATEMENT OF THE CASE

Here there is no dispute over the fact of parentage. The paternity of decedent John (Herbert or Patrick) Fay never was in doubt and is not an issue on this appeal. His father publicly acknowledged decedent as his child in his baptismal and birth certificates. Decedent's maternal nieces, the appellees, concede, and the Surrogate confirmed, his paternity. As a fact, his maternal relatives could not deny decedent's paternity since the underpinnings to the establishment of their relationship to him rest on his birth and baptismal records and, significantly, during the entire life of the decedent, appellees were wholly unaware of their relationship to him.

STATEMENT OF THE CASE

The decedent, known throughout his life by his father's name, John Fay, was born on April 20, 1892, in Edinburgh, Scotland. His baptismal certificate (Appendices D and E, pp. D-1, E-1) shows decedent was baptized as John Herbert Fay, son of John and Eliza Fay, formerly Hunter, lawfully married, on May 1, 1892, in Edinburgh, Scotland. Decedent's civil registration of birth, registered on August 11, 1892 in Edinburgh, Scotland, states he is John Herbert Fay, child of John Fay and Eliza Hunter. Both his parents signed their names on his civil birth record, stating thereon they were the father and mother of decedent, which record was witnessed in writing by the Scots civil registrar. The word "illegitimate" was written on the birth record (Appendix F, p. F-1).

Decedent died intestate on August 9, 1970, a domiciliary of New York and a citizen of the United States. His parents predeceased him. His father died, intestate and penniless, on August 11, 1915, in England; there were no estate proceedings. His mother died on August 24, 1932, in Northern Ireland, leaving a Will by which she bequeathed her estate, personal property, to one of her four sons and some grandchildren.

The genesis of this appeal is a proceeding instituted in the Surrogate's Court, New York County, by the Public Administrator of that county for the settlement of his account as administrator of John Fay's intestate estate. So far as here relevant, the Public Administrator's allegation that decedent Fay's intestate distributees were unknown was controverted by Violet Buck, appellant here, who alleged and established that she was a *paternal* half-sister and a distributee of decedent and argued to the Surrogate that her half-brother was the legitimate son of his father, John Fay, the parent they had in common; that if the Surrogate determined Fay were not legitimate,

nevertheless the statute EPTL 4-1.2(b) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

At the hearing before the Surrogate, Douglas Baird, the then principal in charge of the registration of births, deaths and marriages in Edinburgh, Scotland, testified that the registrar could enter the name of the father of an alleged illegitimate child only if the father attended along with the mother, and was further asked and answered:

Q. Was the father required to do anything at that time [of registration of decedent's birth]?

A. He was required to acknowledge paternity by signing the register as joint informant.

Appellant produced evidence as to the abiding interest, concern and support of both parents with respect to decedent's upbringing, education and maintenance at least until their son went to sea as an apprentice seaman, and also produced evidence as to decedent's own pedigree statements on his application for U. S. naturalization, his passport applications and his hospitalization admission records in which he invariably referred to his parents as Eliza and John Fay.

The Surrogate found that decedent left a paternal half-sister (appellant) and three maternal nieces (appellees) as his intestate relatives; that the decedent was illegitimate; that EPTL 4-1.2 was constitutional; and that the appellees took the entire estate to the exclusion of the appellant because there was no order of filiation.

Appellant also argued the issue of legitimacy and the constitutional issues to the intermediate appellate court, the Appellate Division, which affirmed the Surrogate's decree for the reasons stated by him in his opinion (55

A.D.2d 541[12]). Appellant argued the legitimacy and constitutional issues to the State Court of Appeals. The highest State Court held that it could not review the legitimacy issue and that EPTL 4-1.2(b) was constitutional (Appendix A; 44 N.Y.2d --).

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

(a) Preliminary Argument

Had the authority of *Trimble* been accepted by the State Court of Appeals in this case and *Lalli II* (*Matter of Lalli*, 43 N.Y. 2d 65), the principal thrust here would have been placed on the unequal application of so much of the statute, as written and applied to appellant, which excludes her, solely because her entitlement is derived through the decedent's father, from a substantial inheritance which otherwise would be transmitted to her by her acknowledged illegitimate half-brother, in intestacy.

The State court's indisposition to accept acknowledged paternity as an alternative and paternal kindred as well thus becomes an obverse and converse disengagement by the court from constitutionally-defined considerations of equal protection formulated by this Court. Obversely, were the statute to be stricken for a failure to provide *Trimble's* required alternative, appellant still would not take because she is paternal kindred. Conversely, were the statute to be stricken for unconstitutional, gender-based discrimination, appellant still would not inherit because the State Court of Appeals commands the statute to say an order of filiation is the sole means of entry into the single door of inheritance, by intestacy, from an illegitimate.

Therefore, since the State Court of Appeals, in threads of gossamer distinguishment, refused to follow the pattern, weave and fabric of *Trimble's* ultimate authority

requiring statutory acceptance of a formal acknowledgment by a father as an alternative, this appeal is founded on the dual premise that the section, as construed and applied to appellant, rests on unequal, inequitable, intolerant and unduly harsh standards for inheritance in intestacy in compound violations of the Equal Protection Clause of the Fourteenth Amendment by (1) discriminate refusal to accept appellant's substantive alternative, and (2) gender-based discrimination in refusing to accommodate paternal kindred: accordingly, it should be struck down in its entirety.

The constitutional infirmities of EPTL 4-1.2(b) are: (1) the judicially-imposed condition that an illegitimate's paternity must be established exclusively by a judicial order of filiation determining paternity, where the Legislature is silent as to the form and manner of paternity proof; and (2) the unequal application of the statute which excludes inheritance by appellant from her intestate illegitimate half-brother because appellant's entitlement is from and through decedent's father, even if there were an order of filiation, and despite such absolute entitlement by the niece appellees' claiming from and through decedent's mother, without such order. In such circumstances, in our view, the statute's inability to cope with constitutional infirmities is not cured by a State court opinion which doctors the statute with a remedy of hopeless emancipation for appellant from the stigma of illegitimacy which has been attached to her right of inheritance.

In *Lalli II*, the State Court of Appeals, on remand, definitively interpreted EPTL 4-1.2(a)(2) to require an order of filiation determining paternity in precise compliance with the statutory language as the indispensable condition to an illegitimate's reception of the father's intestate property.

In this case, the State Court of Appeals struck the penultimate blow to the constitutionality of EPTL 4-1.2

by authoritatively determining that it may, "beyond reproach," in the absence of statutory language, judicially legislate into EPTL 4-1.2(b) the requirement of an order of filiation as a precondition to the establishment of paternity, thereby making an order of filiation the sole and exclusive means by which paternal kindred may inherit from an intestate illegitimate. Though the State court twice recognized in *Lalli II* (43 N.Y. 2d at p. 69) that a formal acknowledgment was an acceptable "prerequisite" or "requirement" to this Court, the State court nevertheless held, a formal acknowledgment of paternity was *not* an acceptable "alternative" to a judicial order of filiation. This Court thereafter noted probable jurisdiction of the *Lalli II* judgment (*Lalli* v. *Lalli*, No. 77-1115, March 21, 1978, 46 U.S.L.W. 3578).

The congenital constitutional defect in EPTL 4-1.2(b) is the failure of the Legislature to consummate the right of paternal kindred to inherit from an illegitimate and the right of an illegitimate to inherit from paternal kindred. In no circumstances may paternal kindred inherit from an intestate illegitimate or he from them: the property escheats to the State. Reciprocal rights of intestate succession between illegitimates and maternal kindred and between legitimate and maternal kindred are explicitly granted by the statute. The mote in the Illinois statute may not detract from the beam in the New York statute: "the discrimination remains apparent" (*Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172).

EPTL 4-1.2(b) provides that *only* a filiation order from a competent court suffices to permit reciprocal intestate inheritance between an illegitimate child and his father; and denies paternal kindred, in any circumstances, the right to inherit from an illegitimate intestate.

Since such right is granted to maternal kindred, our position is, this statute invidiously discriminates between the male and female blood lines, where, as here, the

maternal and paternal kindred are similarly circumstanced in the New York statute of descent and distribution (EPTL 4-1.1(a)(7)[d]).

(b) The Establishment of Paternity

There is no single salutary indispensable statutory requirement as to the form and manner of proving an illegitimate's paternity for inheritance purposes that should satisfy a State's proper objective "in providing for the orderly settlement of estates" (Appendix A, p. A-7).

The Minnesota experience is particularly illuminating. Minnesota enacted its legislation treating with intestate distribution of an estate "to provide for the orderly distribution of property left by an intestate decedent." (*Matter of Pakarinen*, 287 Minn. 330, 336, 178 N.W.2d 714, 717, app. dsmd. 402 U.S. 903). To the *Lalli II* court, it was clear, "even in the absence of specific legislative materials, that this statute [EPTL 4-1.2] serves a legitimate State purpose—in the language of *Trimble*, to make provision for 'the orderly settlement of estates . . .'" (43 N.Y.2d at pp. 69-70).

In *Pakarinen*, the Minnesota Supreme Court decided, in 1970, that the statutory requirement (Minn. St. 525.172)) of an attested written declaration of paternity made by the father as the exclusive means by which an illegitimate child could inherit from its father was constitutional; that an adjudication of paternity made by a Minnesota court was not the equivalent of the required statutory proof. The Minnesota court contrasted the two forms of paternity proof in this language (287 Minn. at pp. 337-338):

> And while a written attested declaration of paternity does not provide absolute proof, it does offer the most persuasive proof available (short of marriage to the mother) of the pivotal element:

> an unequivocal acknowledgment of paternal affection and concern for the illegitimate child. Unlike a plea of guilty, which may be made to avoid the expense and embarrassment of trial in a paternity suit, a voluntary written statement which manifests the man's desire to accept this child as his own is such an acknowledgment and, from the public view, establishes both a biological and legal relationship to him.

The Minnesota Legislature thereafter amended Minn. St. 525.172 in 1971 (L. 1971, c. 122) to provide an additional and alternate means for an illegitimate to inherit: "An illegitimate child shall inherit from . . . the person who in writing . . . shall have declared himself to be his father . . . *or* from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction. . . ." This acceptance of an alternative means in no way compromised the State's legitimate interest in the accurate and efficient disposition of an intestate's property.

The exclusivity of a court filiation order as evidence of paternity so as to permit reciprocal intestate inheritance between an illegitimate child and its father has been rejected by this Court as a matter of Federal constitutional law (*Trimble* v. *Gordon*, 430 U.S. 762; *Lalli* v. *Lalli*, 431 U.S. 911).

Observing that "there is a point beyond which such deference [to a state's substantial interest in the orderly settlement of estates] cannot justify discrimination." (*Trimble* v. *Gordon*, *supra*, at p. 767, n. 12), this Court authoritatively was of the view that a "formal acknowledgment of paternity" to establish an illegitimate child's right to claim his share of his father's intestate estate would not compromise a State's interests (*Trimble* v. *Gordon*, *supra*, at p. 772, n. 14).

Although there was a filiation order in *Trimble*, this Court (at pp. 765, 773) took note that the Illinois Su-

preme Court orally affirmed *Trimble* on the authority of *In re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234, involving the consolidated appeals of *Karas* and *In re Estate of Woods*, where there was not, in either case, a filiation order (*Karas*, at 43-44).

Moreover, there is no present member of this Court who is not of the view that a formal acknowledgment of paternity should suffice to establish an illegitimate child's paternity. All the dissenting Justices in *Trimble* agreed in *Matthews* v. *Lucas*, 427 U.S. 495, at 513-514, with the assessment of the three-judge court as it originally ruled in *Norton* v. *Weinberger*, 364 F. Supp. 1117, 1128:

> . . . Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child, unless the child is theirs, and a man who has acknowledged a child is more likely to provide it support than one who has not.

The similarity of the positions taken by the State Court of Appeals in *Lalli I* (*Matter of Lalli*, 38 N.Y. 2d 77), *Lalli II*, and in this case, leaves no doubt the State court is insensitive to the acceptance of a constitutional substantive alternative. This limited surface position of acceptance of, but away from the principle of *Trimble*, taken by the State's highest court in these three recent decisions has crystalized its original position in *Lalli I* into a firm opposition to *Trimble's* broader constitutional reach for an acceptable alternative, bringing the State court, not alone in direct conflict with *Trimble*, but also with *Oregon* v. *Hass*, 420 U.S. 415, 419, wherein this Court said: "But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional*

law when this Court specifically refrains from imposing them." (Italics in original; see, also, *In re Karas*, 61 Ill. 2d 40 at 53)

The disquieting factor in this case is that the State, not through its Legislature but by the fiat of its highest court, has ordained that there shall be but one means of establishing an illegitimate's paternity where inheritance by paternal kindred is involved. This imposition has been mandated despite the lack of any legislative requirement as to paternity proof in EPTL 4-1.2(b) in such instances. And this imposition pointedly was made even after the State Court of Appeals recognized that this Court held (*Trimble*, at p. 772, n. 14) a formal acknowledgment of paternity acceptable (*Lalli II*, 43 N.Y.2d 65, 66). Moreover, out-of-state statutory provisions for the acknowledgment of an illegitimate's paternity which do not meet the precise requirement of the New York filiation order determining paternity will not be recognized in New York. Due Process constraints limit the extent to which a State may monopolize the process of establishing status (*Zablocki* v. *Redhail*, — U.S. —, 54 L.Ed.2d 618, 637, 639-640 [Powell, J., concurring]).

The opinions of the Court of Appeals in *Lalli* and in this case, resting as they do on generalizations of feasibility and archaic notions of precision to be found solely in orders of filiation, are sand-based foundations in ritual adherence to form in distinguishment of, rather than to the substance of, *Trimble*.

In sum, a State may not constitutionally treat a publicly acknowledged illegitimate child differently from an illegitimate child for whom a filiation order has been obtained, and *neither* may such child be treated less equally than a legitimate child for all purposes of inheritance in intestacy. *Trimble* v. *Gordon*, *supra*, mandates that such illegitimates be treated as legitimates

under the Equal Protection Clause of the Fourteenth Amendment.

(c) Unconstitutional Unequal Application of EPTL 4-1.2(b)

The Surrogate found that decedent left a paternal half-sister (appellant) and three maternal nieces (appellees) as his intestate relatives; and although they are similarly circumstanced in the New York statute of intestate descent and distribution (EPTL 4-1.1(a)(7)[d]), he held that the maternal nieces took the entire estate to the exclusion of the paternal half-sister since the decedent was illegitimate (EPTL 4-1.2[b]). If the decedent had been found legitimate, his estate would have been distributed one-third to appellant, his half-sister; one-third to appellee Caillol, his niece, child of a predeceased half-brother; and one-third shared equally between appellees Spencer and Wetherall, his nieces, children of another predeceased half-brother (EPTL 4-1.1(a)(7)[d]).

EPTL 4-1.2(b) limits the distributees of an illegitimate child to the following classes: (1) surviving spouse, (2) issue, (3) mother, (4) maternal kindred, (5) father (if there has been a filiation order). The distinction between the coverage in the fourth class, i.e., maternal kindred, and the fifth class, i.e., father (with a filiation order), is the same distinction which was made by the *Lalli II* majority between the Illinois statute and the New York statute. *The definition of the class "maternal kindred" obviously excludes the class of paternal kindred absolutely, regardless of filiation order or other proof of paternity.* The illegitimate's father, on the other hand, is allowed to take if there is a filiation order. What is this but, in the words of the *Lalli II* court speaking of the Illinois statute, "a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there

were no doubt whatsoever as to paternity" (*Matter of Lalli*, 43 N.Y.2d 65, 68)?

Under EPTL 4-1.2(b) maternal kindred need prove that they are nearest in consanguinity so as to permit them to inherit from an intestate illegitimate child, and no more.

Irrationally, from a constitutional overview, even though nearer in consanguinity to the intestate illegitimate than the maternal kindred and even where there has been a filiation order or formal acknowledgment during the father's lifetime, paternal kindred are denied the right to inherit from him. A maternal first cousin takes the intestate illegitimate's estate to the exclusion of a paternal uncle. (Under EPTL 4-1.2(a), the illegitimate never takes from his paternal kindred).

In *Reed* v. *Reed*, 404 U.S. 71, 75-76, this Court unanimously found that the Equal Protection Clause of the Fourteenth Amendment does "deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute and held that a "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)."

The categorical exclusion of all paternal kindred inheriting from an illegitimate child, even where there has been a filiation order or a formal acknowledgment by the father of his child, is constitutionally impermissible (*Trimble, supra; Jiminez* v. *Weinberger*, 417 U.S. 628, 636, 637; *Gomez* v. *Perez*, 409 U.S. 535, 538; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164; *Levy* v. *Louisiana*, 391 U.S. 68).

There is no question that an intestate succession statute may discriminate against collateral relations, as opposed to ascendants, and against ascendants, as opposed to descendants. But, paraphrasing *Gomez* v. *Perez*, *supra*, once a State posits a judicially enforceable right on behalf of maternal kindred to inherit from an intestate illegitimate, there is no constitutionally sufficient reason for denying such a right to his paternal kindred simply because his acknowledged and acknowledging father has not married his mother.

Where there is designed "asymmetrical statutory discrimination against the illegitimate children of intestate men" (*Trimble*, *supra*, at p. 770), it might rationally be demanded that some State interest to be furthered by the exclusion of paternal kindred be declared.

The State court, appreciating that the borrowed "orderly settlement of estates" justification might sound hollow in the context of this case in order to sustain its resistive adherence to *Trimble* in the requirement of a judicial order of filiation as the sole means of establishing an illegitimate's paternity, finally decided to take note that the Legislature enacted EPTL 4-1.2 on the basis of the study and recommendations of the Bennett Commission on Estates, hereinafter referred to as the Commission (*Lalli II*, 43 N.Y.2d 65, 69).

From an analysis of the Commission's recommendations in detail, pp. 265-268 (Appendix G, pp. G-1-5), it is evident that these recommendations, made in April of 1964, bear the constitutional infirmities disclosed in the dozen opinions of this Court, culminating in *Trimble*.

Enacted in accordance with the Commission Report to ameliorate the harshness of the *nullius filius* view of the Common Law, "tempered by a secondary interest in protecting against spurious claims of paternity" made by illegitimates after the deaths of their fathers (*Trimble*, at p. 776; Appendix G, at p. G-2), EPTL 4-1.2 is now,

under Federal constitutional scrutiny, a statute constitutionally flawed.

The State Court of Appeals says that "[i]t was the Commission's *belief* that the maternal kindred of an illegitimate child would often have knowledge of the child's birth . . ." (Appendix A, p. A-7; emphasis added). The Commission's word was "assumed" (Appendix G, p. G-3). And to what purpose? To "make testamentary provision to exclude such child from sharing in their estate if they wish, while the relatives of the father, in most instances, will have no such knowledge or opportunity." (*Ibid.*) This is no justification to exclude illegitimates *from* paternal inheritance in an intestate succession statute (*Trimble*, at pp. 773-774).

To the Commission, a recognized or acknowledged illegitimate is one whose paternity has been judicially determined by a court of competent jurisdiction during the father's lifetime (*Recommendations*, pp. 241, 266-267, reprinted in Appendix G, pp. G-1 thru 5). The Commission's report was geared almost entirely to the view that *recognized* illegitimates should be barred from inheriting from paternal kindred and from prosecuting proceedings to consummate their right to inherit—"To allow such suits would impede unnecessarily the administration of estates; [and] invite blackmailing litigation. . . ." (Appendix G, p. G-3, 2nd full par., last sentence). The administrative convenience objective is an inadequate justification for gender-based classifications (*Reed* v. *Reed*, 404 U.S. 71, 76; *Craig* v. *Boren*, 429 U.S. 190, 198; *Califano* v. *Goldfarb*, 430 U.S. 199, 211, n.9). Most emphatically, neither decedent nor appellant come within any of the Report objectives of the Commission pertaining to illegitimates.

The State Court of Appeals advanced a further justification for the discriminatory treatment of paternal kindred: "By excluding paternal kindred, other than the father, the Commission sought to avoid creation 'by law

[of] a family group that did not exist in reality'" (Appendix A, p. A-7; Appendix G, p. G-3, 2nd full par., last sentence). At the referenced point, the Commission was treating only inheritances *by* recognized illegitimates *from* paternal kindred. In the fourth paragraph on that page of its recommendations, the Commission demonstrates its even-handed discrimination by saying, without more, "However, no kindred of the father may represent him to take from the estate of the *recognized* illegitimate." (G-4, 1st par.; emphasis added) This is the sum and substance of why paternal kindred may not inherit *from* an illegitimate. We find it difficult to perceive how several unrecognized, unacknowledged illegitimates of a mother, each by a different father, creates a family group entitling them, for that reason, to inherit from maternal kindred or the material kindred to inherit from them.

But the surpassingly extraordinary fact is that these justifications are advanced to support a constitutionally indefensible objective: the exclusion of reciprocal inheritance rights between paternal kindred and a *legally acknowledged* illegitimate, despite such rights being granted maternal kindred and unacknowledged illegitimates and despite the reciprocal inheritance rights between legitimates and maternal and paternal kindred.

Nevertheless, the State Court of Appeals says that "this exclusion [of paternal kindred] is not directed *at* the illegitimate. It is not a punishment for the conduct of his or her parents. Nor are individuals related to the illegitimate denied inheritance on the basis of *their* sex. It is merely a legislative judgment to ensure that only the *true members* of an *illegitimate's family* are permitted to share in his or her estate." (Appendix A, p. A-7; emphasis added)

The Court stresses that we are concerned here not directly with the rights of the illegitimate but with the rights of his paternal kindred. But what difference does

this make? In our view, an illegitimate whose paternity has been acknowledged in a statutorily-prescribed manner, as here, should be treated in every way and in every circumstance as a legitimate. The right to have the same collateral distributees as a legitimate may seem at first blush to be a rather special right, but such an illegitimate should have *every* right, special or not, that the legitimate has. Decedent's paternity is not in doubt, and his kindred, both paternal and maternal, have been established beyond question. There is no social or legislative reason why distribution should not be made to his distributees in the same way that it would have been had he been deemed to have been born legitimate. He and his estate should be vested with all the rights of a legitimate and a legitimate's estate. The right to transmit an intestate inheritance is no less a right than the right to receive an intestate inheritance. Equal protection of the laws is not a sometime right that State courts may cast aside to sustain merely a legislative judgment. "It is a command which the State must respect, the benefits of which *every person* may demand." (Stone, J., in *Hill* v. *Texas*, 316 U.S. 400, 406; emphasis added)

The supports for this family unit "incantation" (*Trimble*, at p. 769) are insubstantial. The assertion that the exclusion of paternal kindred is not a punishment for the conduct of the illegitimate's parents is its own refutation. It is the illegitimate who is once again penalized: unlike the legitimate, the illegitimate may not transmit his intestate inheritance to paternal kindred nor they to him, in part because of his status. Surely no acknowledged illegitimate would be heard to say he or she is not punished by an arbitrary denial of a substantial inheritance from paternal kindred in intestacy.

Moreover, it is irrelevant to say that individuals related to the decedent are not denied inheritance on the basis of *their* sex: the members making up the paternal kindred of an intestate illegitimate may all be females or

all males or females and males. What is relevant and unjustified is that the *paternal* line is an excluded group solely on a gender-based discrimination—the sex of the illegitimate's parents. Maternal kindred may take; paternal may not. It is difficult to see why this distinction is based on anything but sex. In the case at bar, there is not the slightest question in anyone's mind that appellant is related to decedent's father and appellees to his mother. If one class is rejected and the other is accepted, it can only be because of the difference of a father and mother, and what is that but a difference in sex? The discrimination, therefore, is, in our view, invalid (*Reed* v. *Reed*, 404 U.S. 71, 77; *Schanefelt* v. *Paradiso*, 431 U.S. 911; and see, *Green* v. *Woodard*, 40 Ohio App.2d 101, 318 N.E.2d 397 [1974]).

The State Court's assertion that "[i]t is merely a legislative judgment to ensure that only the true members of an illegitimate's family are permitted to share in his or her estate" (Appendix A, p. A-7) is factually insufficient for analytical purposes. Is this the incantation of a legitimate state purpose? Does the exclusion of paternal kindred encourage marriage, discourage promiscuity or protect the family? What is a "true" member of an illegitimate's family? Is this a moral judgment, a standard of conduct, perhaps, or a biological fact, or a mere legislative judgment that a "true" member of an illegitimate's family is a legitimate member, or is it merely the age-old discrimination against illegitimates perfumed and tailored to fit archaic notions of illegitimacy in euphemistic allusions to family propriety to be found solely in maternal kindred? Would the decedent have accepted the appellees, who never knew he existed, as the true members of his family? Whatever the answer is, the incantation has "only the most attenuated relationship to the asserted goal" (*Trimble*, at pp. 768-769 and n. 13) and "bears no fair and substantial relation" to a proper State purpose (*Reed* v. *Reed*, 404 U.S. 71, 76, quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412,

415). Why then are decedent's maternal nieces, "true" members and appellant, his paternal half-sister, an *untrue* member of his family? In fact, we know of no rational answer to this divisive distinction, and, we believe, there is none. Notwithstanding, the State court held the discrimination between maternal and paternal kindred constitutionally permissible (Appendix A, p. A-7).

The arbitrary classification in the case at bar, premised on the decedent's illegitimacy and the sex-based variant for the purposes of inheritance in the parents, creates two categories of collaterals who, although similarly circumstanced in the intestate succession statute, are nonetheless treated differently. This "double-barreled" discrimination in a matter of intestate succession based on two disfavored classifications—illegitimacy and gender—cannot survive constitutional scrutiny and mandate where, as here, they are "illogical and unjust," and bear no fair and substantial relation to a proper State objective (*Trimble* v. *Gordon*, 430 U.S. 762; *Schanefelt* v. *Paradiso*, 431 U.S. 911; *Califano* v. *Goldfarb*, 430 U.S. 199; *Craig* v. *Boren*, 429 U.S. 190; *Gomez* v. *Perez*, 409 U.S. 535; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164; *Reed* v. *Reed*, 404 U.S. 71). The means selected by the State for achieving these improper and insubstantial interests—the total exclusion of paternal kindred—is abhorrent to due process and equal protection concepts: EPTL 4-1.2 cannot be sustained.

Where there has been a filiation order or a formal paternal acknowledgement, as here, we submit that illegitimates should be fully admitted into the community of equal entitlement among human beings, freed at last from the status of "nonpersons" (*Levy* v. *Louisiana*, 391 U.S. 68, 70) in the New York intestate statutes of descent and distribution. When such a person dies, he or she should not be considered, in the divisiveness of an "illegitimate child" (EPTL 4-1.2[b]), but rather, in the wholeness of a "decedent" among all other decedents whose estates are distributed pursuant to EPTL 4-1.1: "The property of

a *decedent* not disposed of by will . . . shall be distributed. . . ." (Emphasis added)

The New York statute governing intestate succession mandates that this domiciliary decedent's estate be distributed to his siblings or to their issue *per stirpes* and that his relatives of the half-blood shall be treated as if they were of the whole blood (EPTL 4-1.1(a)(7)[d]).

Appellant-half-sister and niece-appellees are similarly circumstanced, but are not treated alike: there is no legitimate State interest promoted by differentiating in the circumstances here present between a paternal kin closer in consanguinity and maternal kindred. In this state of affairs, the statute's exclusion of paternal kindred is faulted biologically and flawed constitutionally since a general state of mind governed the assumption of the Commission, transposed into a belief by the State court, instead of a state of facts.

In light of the foregoing, the statute's blanket exclusion of paternal kindred from inheriting from an acknowledged illegitimate where maternal kindred are so permitted is arbitrary and violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

Appellant respectfully submits the Supreme Court of the United States has jurisdiction of this appeal.

Dated: April 27, 1978

Respectfully submitted,

JAMES G. MCGOLDRICK
Attorney for Appellant
Violet Josephine Fay Buck

HAWKINS, DELAFIELD & WOOD
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New York, N. Y. 10005
Of Counsel

APPENDICES

APPENDIX A

Opinion of the Court of Appeals, State of New York, dated March 29, 1978, Case No. 103 (formal parts omitted)

Before Breitel, Chief Judge Presiding

JASEN, J.:

In this accounting proceeding by the Public Administrator of the County of New York, objections were filed by several potential claimants. This appeal involves only objections raised by Violet Josephine Fay Buck, who claims to be a half-sister of decedent by reason of a common father.

The decedent, John P. Fay, died intestate on August 19, 1970, in St. Nazaire, France. At his death, the decedent was a citizen of the United States and a domiciliary of the State and County of New York. His gross estate approximates $6,000,000. Born in Edinburgh, Scotland, on April 20, 1892, the decedent's birth certificate, registered in Edinburgh on August 11, 1892, was signed by one John Fay and Elizabeth Hunter Weatherall. Although the certificate provided for inclusion of the location and date of the marriage of the child's parents, this information was left blank. Moreover, the certificate specifically stated that decedent's birth was illegitimate.

On May 1, 1892, prior to the registration of his birth, decedent was baptized in Edinburgh. Unlike his birth certificate, decedent's baptismal certificate was not signed by his parents. It did include in printed form, however, the word "conjugum", symbolic of the lawful marital status of the child's parents. Beyond decedent's birth and baptismal certificates, there exists no documentary evidence concerning his legitimacy. There exists only the remarkable tale of his early life. There is little doubt that at an early age the decedent and each of his

parents parted ways. From papers found in the decedent's possession, it appears that sometime between 1898 and 1901 the decedent was enrolled in a boarding school in Ireland. For a number of years prior to his enrollment, decedent lived in a foster home with a woman, whom he addressed as "aunt". By the age of 13, however, the decedent, having signed aboard a sailing vessel, was living entirely on his own. He continued to work as a seaman until 1910, when he decided to reside in the United States. It was in 1918 that decedent, while serving in the United States Army, applied for United States citizenship.

As for his parents, at decedent's birth in 1892, his mother, Elizabeth Hunter Weatherall, who had been widowed in 1888, had three sons: Arthur, William and James. The issue of Arthur—Kate Weatherall Spencer and Florence S. Weatherall—and of William—Laurette Caillol—claim to be the sole distributees of the decedent. In 1900, decedent's father, John Fay, married one Hattie Fradley. Appellant Violet Josephine Fay Buck, an issue of this union, claims, as stated before, to be a distributee of the decedent by reason of a common father.

After considering these claims, as well as others not relevant to this appeal, the Surrogate sustained the objections of Kate Weatherall Spencer, Florence S. Weatherall and Laurette Caillol, who claimed through the mother's bloodline, and dismissed the objections of appellant Buck who claimed relationship by reason of a common father upon the ground "that decedent was not legitimate", thereby precluding inheritance through his putative father. The Appellate Division unanimously affirmed for the reasons stated by the Surrogate.

The issue in this case is twofold: whether the decedent was illegitimate; and, if so, whether EPTL 4-1.2, subdivision (b), which precludes inheritance by the paternal kindred of an illegitimate, is violative of equal protection.

There is an established legal presumption that every person is born legitimately. (*Hynes* v. *McDermott*, 91 N.Y. 451, 458; *Matter of Matthews*, 153 N.Y. 443, 447; Fisch, New York Evidence, § 1129 [2d ed.]; Richardson, Evidence, § 59 [10th ed.].) Although this presumption operates most commonly in cases in which the issue involved is not the validity of the parents' marriage, but, rather, the paternity of the child, it does come into play in any case in which legitimacy is in issue. (*Matter of Matthews*, 153 N.Y., at p. 447, *supra*.) It has often been described as "one of the strongest and most persuasive [presumptions] known to the law." (*Matter of Findlay*, 253 N.Y. 1, 7.) However, the presumption of legitimacy is not conclusive: it may be rebutted where to do otherwise would outrage common sense and reason. (*Id.* at p. 8; *Anonymous* v. *Anonymous*, 1 A.D.2d 312.)

The basic problem then is one of proof and it depends upon whether or not there is sufficient evidence in the record to sustain the Surrogate's finding "that upon both the oral and documentary evidence presented it must conclude that decedent was illegitimate." In reaching this conclusion, the Surrogate placed greater weight upon the decedent's birth certificate than upon his baptismal certificate. As he noted, no evidence existed to establish that the decedent's parents were present at the baptismal. This fact stands in marked contrast to the registration of the decedent's birth—the certificate of which was signed by both parents and indicated that the child was

illegitimate. As a result, the Surrogate determined that upon the evidence presented at trial, the presumption of legitimacy was overcome and therefore concluded "that decedent was not a legitimate child." This question of fact having been determined adversely to the appellant and affirmed by the Appellate Division, it presents no question of law which can be reviewed by our court. (See *Howard* v. *Murray*, 38 N.Y.2d 695, 699.)

With respect to the second issue on this appeal—whether EPTL 4-1.2, subdivision (b), which precludes inheritance by the paternal kindred of an illegitimate, is violative of equal protection—appellant argues that this statute discriminates unconstitutionally against decedent's paternal kindred.

EPTL 4-1.2 deals with inheritance by or from illegitimate persons. It provides in pertinent part:

"(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

* * * * *

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

In *Matter of Lalli* (43 N.Y.2d 65, app. docketed, No. 77-1115, 46 U.S.L.W. 3498), we recently upheld the constitutionality of subdivision (a)(2) of EPTL 4-1.2, which requires, before an illegitimate child may inherit from his father, a filiation order made within the lifetime of the father in a proceeding commenced during the pregnancy of the child's mother or within two years of the child's birth. In *Lalli*, we considered the constitutionality of our statute in light of the Supreme Court's decision in *Trimble* v. *Gordon* (430 U.S. 762), wherein the Court struck down an Illinois statute which permitted an illegitimate to inherit from his father only upon proof that his parents had subsequently intermarried. (Ill. Rev. Stat., ch. 3, § 12 [1961].)

In distinguishing our statute, we noted that the standard of review to be applied "while 'less than strict scrutiny' is nonetheless 'not a toothless one'." (*Matter of Lalli*, 43 N.Y.2d at p. 67, *supra*, quoting *Trimble* v. *Gordon*, 430 U.S., at p. 767, *supra*.) Although we acknowledged that a remote rational relationship between our statute and a legitimate State purpose would be insufficient to sustain its constitutionality, we also observed that the Supreme Court recognized that "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and,

even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." (*Matter of Lalli*, 43 N.Y.2d, at pp. 68-69, *supra*, quoting *Trimble* v. *Gordon*, 430 U.S., at p. 771, *supra*.)

With this standard of review in mind, we sustained the limitation upon an illegitimate's right to inherit from his father contained in EPTL 4-1.2, subdivision (a)(2). Appellant's claim of unconstitutionality presents no greater challenge. An order of filiation declaring decedent's father to be John Fay, also the father of the appellant by Hattie Fradley, was never made. Certainly, if in the absence of an order of filiation an illegitimate child may constitutionally be precluded from inheriting from his father, it is beyond reproach to preclude, in the absence of a fiiliation order, inheritance by the paternal kindred of the illegitimate. We are not concerned with a natural child claiming to be a distributee from his father, nor a situation where a putative father makes a claim as against his illegitimate child, but rather a situation where another individual who claims to be a half-sister of a decedent through a common father seeks a share in the illegitimate's estate.

Appellant challenges, however, the facial constitutionality of the preclusion of inheritance by paternal kindred of an illegitimate, other than the father, irrespective of the existence of an order of filiation. Applying a less than strict scrutiny, but yet not a "toothless" standard of review, we hold that the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection.

EPTL 4-1.2 was enacted by the Legislature on the basis of the study and recommendations of the Bennett

Commission on Estates (Fourth Report, Temporary State Comm. on the Modernization, Revision and Simplification of Laws of Estates, N. Y. Legis. Doc. 1965, No. 19, pp. 233-271.) It was the Commission's belief that the maternal kindred of an illegitimate child would often have knowledge of the child's birth whether or not an order of fiiliation was ever made. In contrast, the Commission believed that frequently the paternal kindred of an illegitimate may not have knowledge of the child's birth, notwithstanding the existence of an order of filiation. By excluding paternal kindred, other than the father, from the class of an illegitimate's distributees, the Commission sought to avoid creation "by law [of] a family group that did not exist in reality." (*Id.*, at p. 266.)

It should not be overlooked that this exclusion is not directed at the illegitimate. It is not a punishment for the conduct of his or her parents. Nor are individuals related to the illegitimate decedent denied inheritance on the basis of their sex. It is merely a legislative judgment designed to ensure that only the true members of an illegitimate's family are permitted to share in his or her estate. In addition, it serves a legitimate purpose in providing for the orderly settlement of estates and the dependability of title to property passing under our laws of intestate distribution. We thus find no constitutional infirmity in precluding inheritance by the paternal kindred of an illegitimate.

The order of the Appellate Division should be affirmed, with costs, payable out of the estate, to all parties separately appearing and filing separate briefs.

* * * * *

Order affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate.
Opinion by Jasen, J. All concur.
Decided March 29, 1978

APPENDIX B

Final Judgment of the Court of Appeals, State of New York, dated March 29, 1978, Case No. 103 (formal parts omitted)

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

The appellant in the above entitled appeal appeared by James G. McGoldrick; the respondent(s) appeared by White & Case; and Louis J. Lefkowitz, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate. Opinion by Jasen, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate's Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA,
Clerk of the Court.

Court of Appeals, Clerk's Office, Albany, March 29, 1978.

APPENDIX C

Notice of Appeal to United States Supreme Court

SURROGATE'S COURT
COUNTY OF NEW YORK
File No. 5035—1970

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of JOHN PATRICK FAY, also known as JOHN P. FAY,

Deceased.

NOTICE is hereby given that Appellant VIOLET JOSEPHINE FAY BUCK (the daughter of John Fay, putative father of decedent) hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals, State of New York, entered on March 29, 1978, affirming the decree of Surrogate's Court, New York County, dismissing her objections to said intermediate account and her claim as a distributee herein, and adjudging that Estates Powers and Trusts Law § 4-1.2 is constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).
Dated: April 25, 1978.

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To: WHITE & CASE, ESQS.
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HON LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
(Irwin M. Strum, Esq.)
Two World Trade Center
New York, New York 10047

APPENDIX D

Decedent's Baptismal Certificate (Latin)

EXTRACTUM EX LIBRO BAPTIZATORUM,

Ecclesiæ SS. Cordis Jesu, ——— *apud* Lauriston, Edinburgin *Diœcesi* S. Andreæ et Edinburgen

No. III, pag. 506

A581

Anno 1892 die 20° mensis Aprilis natus anno 1892 die 10° mensis Maii baptizatus est Joannes Herbertus Fay ——— filius Joannis et Elisabethæ ——— et ——— (olim Hunter ——— ———) conjugum: a me Thoma Greenan S.J. ———

~~Patrinus fuit~~ ——— Matrina fuit Violetta Mc Intosh ———

Ego cancell. eccles. Eccles. SS. Cordis Jesu, Edinb. in Diœcesi S. Andreæ et Edinburgensis testor prædictum extractum in omnibus esse conforme cum Registro. In cujus fidem hunc testimonio mea manu subscripsi Thoma Greenan S.J. die 1°. Novembris ——— Anno Domini MCMXXIII.

Decedent's Personal Papers
Tb-Decedent's: Baptism Cert.
(Latin side)

APPENDIX E

Decedent's Baptismal Certificate (English)

Obj. Buck's Collective Ex. 1
Decedent's Personal Papers
Ib-Deced't's. Baptism Cert.
(English side)

CERTIFICATE OF BAPTISM.

According to the Register of Baptisms kept at the Church of the Sacred Heart, Lauriston, Edinburgh

John Herbert Hay Son of John Hay and Eliza Hay

formerly Wearter lawfully Married, Born 20th April 1892

was Baptised at the said Church, by Father Thomas Freeman SJ on the 1st day of

May 1892, Violet McIntosh and being God-Parents.

I, the undersigned, hereby certify that the above is a true and correct extract from the Register of Baptisms kept at the above Church. As witness my hand, this 1st day of November 1923

Thomas Higgins

A580

Rosehill Brothers Ltd., Castle Street, Liverpool.

F-1

APPENDIX F

Decedent's Birth Certificate

2d Edinburgh Ent 2 in evr.
6-5-73
AD.

No.	(1.) Name and Surname	(2.) When and Where Born.	(3.) Sex.	(4.) Name, Surname, & Rank or Profession of Father. Name, and Maiden Surname of Mother. Date and Place of Marriage.	(5.) Signature and Qualification of Informant, and Residence, if out of the House in which the Birth occurred.	(6.) When and Where Registered, and Signature of Registrar.
1294	John Hendrie Fay.	1892. May Twentieth. 11h 5m P.M. No 13. Caledonian Road. Edinburgh.	M.	John Fay. Coal Merchant. Elizabeth Hunter Bothwell. Widow of James Harper Tenter Bank Clerk who died in Holywood Ireland. 15th of April 1888.	Elizabeth Hunter Bothwell Fay. Mother. Eliz Fay. Present at Birth.	109 August 11th At Edinburgh. John Peterkin Registrar.

A656

RESP.
Buck

SURROGATE'S COURT
NEW YORK COUNTY
EXHIBIT NO.
MAR 20 1974
MARCUS

Obj. Buck's Exhibit 29
Decedent's Birth Record

APPENDIX G

Excerpts from Recommendations of the Bennett Commission on Estates (April 3, 1964), pages 240-241, 265-268

pp. 240-241:

Recommendations in Brief

1. It is recommended that for the purpose of inheritance to and through an illegitimate child, such child be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants and collaterals in all degrees, whether or not the mother has legitimate children.

2. It is recommended that the Decedent Estate Law be amended to grant the illegitimate the right to inherit from his father the share of a legitimate child of such father, but only when a court of competent jurisdiction has, during the lifetime of the father, made an order declaring the illegitimate to be a child of such father and entitled to inherit from him. Such an order may be based on a voluntary acknowledgment made before the court in form sufficient for recordation. No agreement or compromise, of itself, shall establish a right to inherit by the illegitimate in the absence of such court order. The fact that the party alleged to be the father has furnished support for the child, has recorded his name on the child's birth certificate, or has acknowledged the child in any other manner, shall not be evidence sufficient to establish a right of inheritance, by the illegitimate in the absence of the court order mentioned above.

3. It is recommended that no proceeding to establish the paternity of the child shall be brought after the lapse of more than two years from the birth of the child.

4. It is recommended that the court which rendered the order described in recommendation 2, *supra*, may re-

lieve the party alleged to be the father from it, pursuant to Rule 5015 CPLR, but only where:

(a) the motion to be relieved from the effect of such order is made by the party declared to be the father; and

(b) the motion is made not more than one year after the entry of such order.

5. It is recommended that the present law be continued in that all those from whom the illegitimate and his issue may inherit may inheritfrom him and his issue in the order and amount prescribed by the statutes of descent and distribution governing inheritance from a legitimate and his issue.

6. It is recommended that formal acknowledgments made in foreign jurisdictions that meet the requirements set forth in this report for a valid acknowledgment in New York be recognized as valid in this State.

pp. 265-268:

Recommendations in Detail

The recommendations of this report are intended to grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children while protecting innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs. This end is achieved by equating legitimates and illegitimates for the purpose of inheritance from the mother and maternal kindred, and granting the illegitimate a limited right of inheritance from his father subject to statutory safeguards. The adoption of the recommendations proposed in this report will safeguard the interests of the

illegitimate in the proceeds of a successful action for wrongful death, and estates passing by will or devise, as well as in estates descending and being distributed by operation of the law of intestate succession.

The wording of the provision governing inheritance by the illegitimate from his mother and his mother's kn is taken from the Texas statute. It is intended to apply whether or not the illegitimate has been acknowledged by his father, and whether or not the mother has legitimate children. The recommendation would grant the illegitimate the right to inherit from his mother, and all her kindred including her other illegitimate children. As may be seen in Appendix A to this report 20 states of varying wealth and population have already granted the illegitimate such a right, while only Louisiana has a policy more stringent than New York's in this area.

The acknowledged illegitimate may inherit only from his father and not from the father's kindred because it is assumed that members of the mother's family will often have knowledge of the fact that she has given birth to an illegitimate child and make testamentary provision to exclude such child from sharing in their estate if they wish, while the relatives of the father, in most instances, will have no such knowledge or opportunity. In addition, it is intended that recognized illegitimates be barred from inheriting from recognized illegitimates or legitmate children of the same father by a dfferent mother. To allow such suits would impede unnecessarily the administration of estates, invite blackmailing litigation, and create by law a family group that did not exist in reality.

The illegitimate issue of a male illegitimate will inherit from their father only if he has recognized them, and will not inherit from their grandfather whether he has recognized their father or not. The illegitimate issue of

a female illegitimate are similarly barred from inheriting from their mother's father, whether he has recognized the mother or not.

Inheritance from the unrecognized illegitimate is to be governed by an extension of the present rule. The property of the illegitimate will descend to his spouse and issue, if there are any, and if there are none, to the mother and her kindred. Descent and distribution of the estate of a recognized illegitimate whose father and mother are alive at his decease shall be according to the ordinary descent and distribution statute. However, no kindred of the father may represent him to take from the estate of the recognized illegitimate.

The utmost caution should be exercised to protect innocent men from unjust accusations in paternity claims. To avoid this hazard, no informal method of acknowledgment has been provided for in the recommendations. While a formal acknowledgment alone would be a considerable advance over the statutes of most states allowing inheritance from an acknowldging father, it is felt that the recommendation here made gives even more protection against such hazard. The procedure in other states provides merely that any informal witnessed writing establishing the relationship of father and child between the deceased and the claimant is sufficient to establish paternity, allows paternity to be established after the death of the father, thus affording considerable opportunity for falsification of evidence and inviting harassing litigation. These problems are eliminated by requiring a court order establishing paternity during the lifetime of the father.

At present, the Family Court has "exclusive original jurisdiction to establish paternity" under section 511 of the Family Court Act. It is felt that because the action to establish paternity for the purposes of heirship must

be brought in the Family Court, confusion might arise as to whether the order of the court established in the illegitimate a right to support or a right to inherit from the father. This is an important distinction because under secton 516 of the Family Court Act, the court may approve a support agreement made by the parties themselves without finding of paternity. For this reason it has been recommended that in order for the child to inherit the order of the Family Court must declare the illegitimate to be the child of the putative father and entitled to inherit from him rather than merely stating that the child is entitled to support. In addition, proof that the putative father has furnished support for the child, which section 517 of the Family Court Act intimates is a sufficient acknowledgment of paternity, has been specifically excluded as a basis upon which paternity for the purposes of heirship may be established without the order of the court. Thus, where several men have had intercourse with the mother, the Family Court in its discretion may provide that only a right to support has been established, and the putative father will have the opptrounity to make a settlement that provides for support and grants no right of inheritance to the illegitimate. It may be argued that the institution of paternity proceedings under present law is often motivated by blackmail, harassment or fraud, but the recommendation in no way enlarge the risk of injustice in that area.

A further safeguard is to be found in the statute of limitations recommended which bars a suit to establish heirship not brought within two years after the birth of the child. The two-year period is currently prescribed by section 517 of the Family Court Act in paternity proceedings. The statute of limitations will not apply to voluntary acknowledgments.

Excerpts from Recommendations of the Bennett Commission on Estates (April 3, 1964), pages 240-241, 265-268

The statute of limitations on a motion to obtain relief from the order of the Family Court is adopted from Rule 5015 of the C.P.L.R. The grounds for relief there stated are excusable default, newly discovered evidence, fraud, misrepresentation or other misconduct, lack of jurisdiction, or reversal, modification or vacatur. Rule 5015 imposes no statute of limitations on a motion for relief except one year in the case of excusable default. The commentary to the section states that a "reasonable time" is implied. This would provide insufficient protection for the illegitimate and render uncertain the identity of probable heirs and distributees of the estate. In addition, a "reasonable time" might alow the motion to be made by the heirs after the death of the father. For these reasons the recommendations provide that the motion must be made "by the party declared to be the father . . . not more than one year after the entry" of the order establishing a right of inheritance in the illegitimate.

The final recommendation is intended to protect those illegitimates entitled to inherit in the jurisdiction where they were acknowledged. It is also intended that no acknowledgment resulting from a judicial proceeding commenced after the death of the father in another jurisdiction shall establish any right to inherit in New York, nor shall an informal acknowledgment in another jurisdiction affect the devolution of property in New York.

6. CONCLUSION

The present policy of New York State which severely limits the rights of illegitimates should be altered to grant them the inheritance rights recommended in this report.

Dated: April 3, 1964.

Supreme Court, U. S.
FILED
MAY 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of

JOHN PATRICK FAY, also known as JOHN P. FAY,
Deceased,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO AFFIRM OR DISMISS

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IN THE

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October Term, 1977

No. .....

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate

of

JOHN PATRICK FAY, also known as JOHN P. FAY,
Deceased,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellees, Florence Sylvia Wetherall Hunter, Kate Wetherall Spencer and Laurette Caillol, respectfully move this Court to affirm the judgment below,

of The Court of Appeals of the State of New York, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument; or in the alternative, to dismiss the appeal herein for lack of a substantial federal question.

Statement of Appellees' Position

The appellant attacks the facial constitutionality of Section 4-1.2 of the Estates, Powers and Trust Law of the State of New York (EPTL) which provides as follows:

> "§4-1.2 *Inheritance by or from illegitimate persons*
>
> "(a) For the purposes of this article:
>
> "(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> "(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> * * *
>
> "(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

In support of the contention that the statute is unconstitutional and to sustain jurisdiction on this appeal appellant cites *Trimble* v. *Gordon,* 430 U.S. 762; *Lalli* v. *Lalli,* 431 U.S. 911; *Pendleton* v. *Pendleton,* 431 U.S. 911; *Schanefelt* v. *Paradiso,* 431 U.S. 911 and *Reed* v. *Reed,* 404 U.S. 71.

It is appellees' position that the statutory omission of paternal kin as distributees of an illegitimate, at least where there has been no order of filiation, presents a situation substantially different from the questions and issues involved in the cited authorities, and that the statutory provision is, in the context of this appeal, well within the constitutional authority of the State Legislature.

Preliminary Statement

Appellant's "*Preface to Statement of the Case*" states that appellees could not deny decedent's paternity since the underpinnings to the establishment of their own relationship to him rest on his birth and baptismal records. Appellant has misapprehended the position of appellees. It is the position of appellees that the birth process itself supports the relationship of the mother as recorded in the near contemporaneous baptismal and birth certificates, but that the relationship of the father is, at best, only putatively indicated by those documents. It may be noted that appellant's own expert witness Philip Issac Caplan Q.C. testified on the evidential impact of the documents as follows:

> "Now I may say that that really represents the position equally to the evidential value of either an entry from a baptismal record or an entry from a civil register of births. In other words, each of these items would be accepted as evidence, but the weight that would be

given to them would depend on the total circumstances of the case. They would be accepted as evidence, but neither would be conclusive proof of the facts they purport to record." (R-A418)*

Statement of the Case

The decedent, John Fay, was born on April 20, 1892 in Edinburgh, Scotland. He was baptized there on May 1, 1892 (app. D and E, pp. D-1, E-1).** His birth was registered in Edinburgh on August 11, 1892.† The birth certificate is signed by one John Fay, as father and Elizabeth Hunter Wetherall, as mother (app. F, p. F-1).

Apart from the birth certificate, there is no other document subscribed by the putative father to support the claim of a father-child relationship.

The child was placed in a foster home shortly after his birth. He was never publicly acknowledged by his parents, and, in fact, his existence was a carefully kept secret.

Elizabeth Hunter Wetherall had been widowed in 1888. She had three sons of her marriage, whom she raised in Holywood, Ireland. The appellees are grandchildren of Elizabeth Hunter Wetherall, who together with her three sons, predeceased the decedent.

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* Reference is to the appendix in the Court of Appeals, State of New York.

** "app." references are to the appendices to the Jurisdictional Statement.

† The record discloses that as the birth registration was three months beyond the date of birth, under then applicable law the registration should have been on the authority of the Sheriff—a judicial officer—that formality was avoided by reflecting the birth date as May 20, 1892, a date within three month's of birth.

The putative father also lived in Holywood, Ireland. He was a widower in 1892, and in 1900 he married one Hattie Fradley. The appellant, Violet Buck, and a predeceased brother, John Gerald, were born of that marriage.

John Fay, the decedent, died an intestate domiciliary of New York, on August 18, 1970. The Surrogate's Court of New York County determined that his birth was illegitimate, that the appellees were his distributees and that Section 4-1.2 of the Estates Powers and Trust Law was constitutional. The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the decree of the Surrogate and on further appeal to the Court of Appeals there was a unanimous affirmance of the Courts below (app. A, pp. A-1 through A-7).

ARGUMENT

1. Reasons why the question presented is not substantial.

(a) A natural father's right in intestacy to share in the estate of an illegitimate child.

The appellant claims to be a sister of the half-blood of the decedent through a common father. On the basis of that claimed relationship, she seeks a benefit *from* the illegitimate's estate. As her claim is representative through her father, she must demonstrate that EPTL Section 4-1.2 is unconstitutional because it unreasonably restricts or limits inheritance by the father himself to those instances in which an order of filiation has been made. Only if she establishes the unconstitutionality of that provision do we reach the second question of whether the statute is constitutional in its denial to paternal kindred status as distributees, in the circumstance where (as is not the case here) an order of filiation has been entered.

The essential threshold question on this motion is whether the requirement of an order of filiation is within the constitutional authority of the State in the circumstance where the father of a deceased illegitimate, (or the appellant claiming through him), seeks a benefit *from* the estate of the illegitimate. There is no discrimination *against* the illegitimate involved and no deprivation of the rights of the illegitimate at issue. The question is simply and solely whether the state may constitutionally require that a claimant father should prove, in a particular way, his relationship to the child upon whom he has visited the status of illegitimacy.

Whatever the standard of scrutiny under the Equal Protection Clause, appropriate to the claims of illegitimate children, there does not appear to be any basis for departure from a "rational basis" or "minimal scrutiny" test in a claim that has nothing whatever to do with discrimination *against* an illegitimate. In fact, the requisite standard of proof of relationship of the father of an illegitimate, where a benefit is sought *from* the illegitimate's estate, should have little or nothing to do with the Equal Protection Clause which operates, in that context, essentially to prevent discrimination *against* an illegitimate child. The fact that the statute restricts inheritance by an illegitimate *from* a natural father or paternal kindred is not at issue on this appeal. There are no principles, either logical or sociological which decree reciprocity of inheritance rights, either as relates to inheritance by an illegitimate from a natural father or by a natural father from an illegitimate. As a matter of fact, no basis can be perceived why inheritance rights generally, should be governed by principles of reciprocity. Historically they never have been. By way of analogy, under Section 117 of the New York *Domestic Relations Law* (prior to its amendment in 1966), an adopted child enjoyed inheritance rights in intestacy from his natural parents. The natural parents did not enjoy such rights from the adopted child whose distributees were the child's foster parents.

Sections 83(14) and 83(8) of former New York *Decedent Estate Law* provided that an illegitimate child shared in his intestate mother's estate only if she was not survived by legitimate issue but the mother in contrast was an heir of the child without regard to any exception and even if she had other legitimate children.

It is axiomatic that a statute *shall* be presumed and determined to be constitutional if any state of facts may reasonably be conceived to justify it. *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *McDonald* v. *Board of Elections Commissioners,* 394 U.S. 802, 809 (1969).

With respect to the right of a natural father (or the right of one claiming through him) to benefit, in the estate administration process, the legislative requirement of proof as to entitlement through a Court order (however else the claimant may have declared his status) appears eminently reasonable to insure the orderly administration of estates and is in no sense an infringement of any constitutional right.

(b) The status of paternal kindred of an illegitimate child.

Section 4-1.2(b) provides that the natural father is a distributee of his illegitimate child only if there has been an order of filiation. There is no order of filiation here. However, even where an order of filiation has been made, paternal kindred are not included among the distributees of an intestate illegitimate child. As the Court of Appeals noted in the decision from which this appeal is taken, the statutory exclusion of paternal kindred is not directed at the illegitimate, nor is it a punishment for the parent's conduct. The individuals related to the decedent are not denied inheritance on the basis of their sex. Rather, the statute is designed to insure that only true members of an illegitimate's family share in the estate and it serves the State purpose of providing for the orderly settlement of estates.

The decision in *Matter of Flemm,* 85 Misc. 855 (1975), reviewed EPTL 4-1.2, its purpose, effect and legislative history, in some detail, from the vantage point (in the words of the Court) of "The experience of this the busiest Court in the State measured by the number of intestate estates which traffic daily through this Court." The opinion discusses the State's responsibility to provide for the orderly devolution of property and the substantial problems involved in notice to illegitimates in order that procedural due process and finality of decree and title to property might be achieved. At p. 859 the Court summed up those problems as follows:

> "The procedural problems, however, were of real concern to the experienced members of the commission. An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent. (SCPA 1003.) And, in probating the will of his parent (though not named a beneficiary) or in probating the will of any person who makes a class disposition to "issue" of such parent, the illegitimate must be served with process. (SCPA 1403). How does one cite and serve an illegitimate of whose existence neither family nor personal representative may be aware? *And of greatest concern, how to achieve finality of decree in* **any** *estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries?* Finality in decree is essential in the Surrogate's Courts since title to real property passes under such decree. Our procedural statutes and the Due Process Clause mandate notice and opportunity to be heard to all necessary parties. Given the right to intestate succession, *all* illegitimates must be served with process. This would

be no real problem with respect to those few estates where there are "known" illegitimates. But it presents an almost insuperable burden as regards "unknown" illegitimates. The point made in the commission discussions was that instead of affecting only a few estates, procedural problems would be created for many—some members suggested a majority—of estates." (Emphasis supplied.)

EPTL 4-1.2 was enacted by the Legislature on the basis of the study and recommendations of the Bennett Commission on Estates (Fourth Report, Temporary State Comm. on the Modernization, Rev. and Simplification of Laws of Estates, N.Y. Legis. Doc. 1965 No. 19, pp. (233-271)) (excerpted at app. G, pp. G-1 through G-6).

The Report discussed the problems relating to paternal kindred inheritance. In supplement to the State's purpose and obligation with respect to the orderly administration of estates, it was the perception of the New York Legislature that members of the mother's family will often have knowledge of the fact that she has given birth to an illegitimate child whereas, even in the circumstance where there is an order of filiation, the relatives of the father will have no such knowledge. In the words of the Commission, it was the legislative purpose, in the exclusion of paternal kindred, to avoid creation "by law [of] a family group that did not exist in reality."

(c) The impact of the decisions in *Trimble* v. *Gordon*, 430 U.S. 762 (1977) and *Matter of Lalli*, 43 N.Y. 2d 65, Jur. Not. 46 U.S.L.W. (1978) on the issues in this appeal.

This Court in *Trimble* v. *Gordon* considered and found unconstitutional former Section 12 of the Illinois Probate Act which, in pertinent part, precluded an illegitimate child from inheriting from an intestate father except in the circumstance where the parents intermarry and the child is acknowledged by the father as the father's child, in which event, the statute provided that the child should be considered as legitimate. In *Matter of Lalli* the New York Court of Appeals, on remand from this Court, adhered to its previous decision and found that the New York statute differed significantly from the Illinois statute and that the New York statute met the constitutional guidelines set forth in *Trimble* with respect to inheritance by an illegitimate.

Both the *Trimble* and the *Lalli* decisions refer to the obvious difficulty in the proof of paternity. *Trimble* held that difficulty of proof does not justify total exclusion of illegitimate children from the estates of their intestate fathers. *Matter of Lalli* held that the statutory form of proof required under the New York statute for an illegitimate child to inherit *from* his father was well within the standard articulated in *Trimble*. It is obvious, if *Lalli* is affirmed by this Court that the issues on this appeal present an *a fortiori* situation. Quite apart, however, from the authority of *Lalli*, the fact pattern and issues involved here are substantially different and the determination in *Trimble* does not afford a constitutional basis for this appeal.

In the *Trimble* decision, this Court noted that:

> "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."

It certainly follows that an even more demanding standard may be required of those claiming *from the illegitimate's* estate.

Again, in *Trimble*, where this Court had before it for review a situation involving penalization of the illegitimate child, the Court nonetheless went on to observe that:

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance."

We are left then on this appeal to consider, in the light of the principle that "courts should accord substantial deference to a State's statutory scheme of inheritance," whether the standard of an order of filiation is so overstringent as to present a Constitutional question in the situation where, as here, the father, or one claiming through him seeks a benefit *from* the illegitimate's estate.

In the opinion of the Supreme Court of Minnesota in *In re Estate of Peter Pakarinen,* 287 Minn. 330, 178 N.W. 2d 714 (1970) app. dsmsd. 402 U.S. 903 (1971) cited in appellant's Jurisdictional Statement, the Court, in distinguishing wrongful death and inheritance rights, stated:

> "While we unhesitatingly agree that such distinctions made solely on the basis of legitimacy are a denial of equal protection [none of] these decisions can be considered controlling authority for the proposition that it is constitutionally impermissible to require an illegitimate attempting to inherit from his putative father to produce virtually unassailable proof that the decedent is in fact his father for the distinct purpose of determining his rights of inheritance."

Trimble v. *Gordon* does not impinge on that principle. Nor can the *Trimble* decision be rationally stretched to the situation on this appeal. Here, in contrast, the obligation of proof by order is imposed, not on the illegitimate, but on the father, the very person who was capable of ordering events.*

Appellees submit that neither the overall decision of this Court in *Trimble* v. *Gordon* (whether liberally or narrowly read) nor any single specific pronouncement of the Court therein, is authority for the proposition that EPTL 4-1.2, in its provision relating to inheritance by paternal kindred, is unconstitutional.

---

* It may be noted that the record below established that a judicial order of paternity was obtainable by registration of the birth on the authority of the Sheriff or through a proceeding in Declarator.

(d) Appellant, in her assertion of a substantial constitutional question on this appeal, does not meet the issues cogently stated by the Court of Appeals.

As stated by the Court of Appeals:

> "Appellant challenges, however, the facial constitutionality of the preclusion of inheritance by paternal kindred of an illegitimate, other than the father, irrespective of the existence of an order of filiation. Applying a less than strict scrutiny, but yet not a 'toothless' standard of review, *we hold that the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection.*
>
> EPTL 4-1.2 was enacted by the Legislature on the basis of the study and recommendations of the Bennett Commission on Estates (Fourth Report, Temporary State Comm. on the Modernization, Revision and Simplification of Laws of Estates, N Y Legis. Doc. 1965, No. 19, pp. 233-271). It was the Commission's belief that the maternal kindred of an illegitimate child would often have knowledge of the child's birth whether or not an order of filiation was ever made. In contrast, the Commission believed that frequently the paternal kindred of an illegitimate may not have knowledge of the child's birth, notwithstanding the existence of an order of filiation. By excluding paternal kindred, other than the father, from a class of an illegitimate's distributees, the Commission sought to avoid creation 'by law [of] a family group that did not exist in reality.' (*Id.* at p. 266.)
>
> It should not be overlooked that this exclusion is not directed at the illegitimate. It is not a punishment for the conduct of his or her parents. Nor are individuals related to the illegitimate decedent denied inheritance on the basis of their sex. It is merely a legislative judgment designed to ensure that only the true members of an illegitimate's family are permitted to share in his or her estate. In addition, it serves a legitimate purpose in providing for the orderly settlement of estates and dependability of title to property passing under our laws of intestate distribution. We thus find no constitutional infirmity in precluding inheritance by the paternal kindred of an illegitimate." (app. A, pp. A-6, A-7) emphasis supplied.

As the Court of Appeals noted, the statutory difference in the treatment of paternal kindred and maternal kindred in respect to a deceased illegitimate's estate does not arise from, or result in, an invidious gender-based discrimination. It is, in no sense, predicated on archaic presumptions of the superiority of one sex over another such as led to the determination of unconstitutionality in *Reed* v. *Reed*, 404 U.S. 71 (1974), which considered a statute that accorded male distributees priority over equally qualified females in appointment as administrators of a decedent's estate.

In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) this Court considered a statute that required widowers to show dependence upon their deceased wives for over one-half of their support in order that they might qualify for survivors' benefits under the Social Security Law. Widows on the other hand were entitled to those benefits irrespective of dependence on their deceased spouse. A closely divided court (5-4) found that disparate treatment to be unconstitutional. Justice Stevens, in his concurring opinion, reviewed the evolution of the statute in issue and made the following observation:

> "It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate

the terms 'widow' and 'dependent surviving spouse.' ...

"I am therefore persuaded that this discrimination against a group of males is merely the accidental by-product of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that 'due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the government as its justification. (citation omitted)"

EPTL Section 4-1.2, in its exclusion of paternal kindred from distributee status in the estate of a deceased illegitimate, is the end result of specific "analysis" and "actual reflection," and of careful study, intensive, protracted and systematic. As clearly demonstrated by its legislative history, hereinabove discussed, the statute evolved and was enacted only after careful and deliberative consideration by the community through its duly constituted legislative process. Such legislative history, together with the authorities hereinabove discussed, establish that, central to the thrust of the statute, (and, indeed, the very heart and core of the legislation itself) was the expression of the legitimate interest of the community in the orderly devolution of estates.

The statute has no purpose or intent to, nor does it, *in effect*, discriminate against males. It merely recognizes the difficulties inherent in proof of male parentage and accordingly, effectuates the sound and legitimate purpose of avoiding the uncertainty, confusion and disorder which would ensue in the devolution of property by reason of the

pragmatic impossibility of establishing kinship through the male parent where participation in the illegitimate's estate is concerned. The result thus achieved avoids the impediment to the settlement of estates which would otherwise arise from "the possibility . . . of a secret illegitimate lurking in the buried past . . . ." Differentiation in gender treatment which results from a legitimate purpose is not unconstitutional. *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

Were this Court to countenance the appeal from the determination "that the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection", it is difficult to assess how its decision so to do would redound to the advantage of an illegitimate child. On the other hand, such action might well enmesh this tribunal in a quagmire of local concerns involved in the devolution of property which this Court itself has characterized as "a matter particularly within the competence of the individual states."

Conclusion

The facts establish that the decedent was illegitimate. He was not only excluded from any familial relationship with his alleged father's family in his lifetime but his very existence was unknown to them. The statute contemplates just such situations when it bars intestate inheritance by the father himself, absent an order of filiation, and in its provision that paternal kindred shall not be included as distributees.

Appellant now seeks a benefit from the illegitimate's estate through nullification of the statute on alleged constitutional grounds. Her position does not in any way enhance the status of the illegitimate. It ignores the difficulties of proof inherent in the establishment of paternity as well as the State's right and obligation to provide for the orderly devolution of property and results in the creation by law of a family that never existed in fact.

The appeal should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1567

INTERMEDIATE ACCOUNTING OF THE PUBLIC ADMINISTRATOR of the County of New York, as Administrator of the Estate of

JOHN PATRICK, also known as JOHN P. FAY,

Deceased,

VIOLET JOSEPHINE FAY BUCK,

Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER and LAURETTE CAILLOL,

Appellees,

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The appellee, Attorney General of the State of New York, appearing pro se on behalf of the constitutionality of the New York Estates, Powers and Trusts Law, § 4-1.2(b), pursuant to Rule 16 of the Rules of this Court, respectfully moves that this appeal be dismissed for want of a substantial federal question or that the judgment below be affirmed.

Opinions Below

The opinion of the New York Court of Appeals is published at 44 N Y 2d —— (1974). The opinion of the Appellate Division of the New York Supreme Court, First Department is published at 55 A D 2d 541 (12). The opinion of the Surrogate's Court, New York County is unreported and is not provided by the appellant in her "jurisdictional statement."

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statute Involved

Estates, Powers and Trusts Law, § 4-1.2(a) and (b) is reproduced at p. 3, Jurisdictional Statement.

Statement of the Case

Appellant seeks to declare unconstitutional a section of the Estates, Powers and Trusts Law of the State of New York, i.e., § 4-1.2(b). This proceeding was instituted in Surrogate's Court, New York County by the Public Administrator of that county to settle his account as administrator of John Patrick Fay, a/k/a John P. Fay's intestate estate. Appellant Buck interposed objections to said account alleging to be a distributee of John Patrick Fay, a/k/a John Fay (hereinafter referred to as "decedent"). The Surrogate dismissed appellant's objections.

The Surrogate found that: "decedent" was illegitimate; "decedent" was survived by three maternal nieces (co-appellees) and a paternal half-sister (appellant) as his intestate relatives; EPTL § 4-1.2 was constitutional; and that

pursuant to EPTL § 4-1.2 "decedent's" distributees at law were his three maternal nieces.

The decree of the Surrogate was affirmed for the reasons stated by the Surrogate in the Appellate Division of the New York State Supreme Court.

The New York State Court of Appeals reviewed the constitutionality of the statute at bar and held that the statute was constitutional and further upheld the determinations of the lower courts.

For the purpose of this appeal there are no factual disputes. No order of filiation was ever entered indicating that the "decedent", John Patrick Fay, was the son of John Fay.

John Fay, the alleged father of "decedent", purportedly executed a civil registration of birth for one John Herbert Fay—illegitimate. See: Jurisdictional Statement, Appendix F, p. F-1. The instrument in question acknowledges the birth of John Herbert Fay. The "decedent" in the case at bar is John Patrick Fay a/k/a John P. Fay. What the intentions of John Fay were in executing this instrument are only speculative. To consider the execution an absolute acknowledgment of paternity in this matter is to speculate beyond rational comprehension.

However, the execution of this instrument is neither relevant nor dispositive of the true and simple issue involved in this case.

EPTL § 4-1.2(b), the section of the state law under attack herein, provides that if an illegitimate dies, such as the decedent, John Patrick Fay, his surviving spouse, issue, mother, maternal kindred and father, may inherit as if the decedent were legitimate but the father may only inherit if an order of filiation had been obtained in accordance with the provisions of subparagraph 2 found in § 4-1.2(a) of the EPTL.

The Court of Appeals of the State of New York in construing § 4-1.2(b) concluded that it could not consider any

attack on the section based upon a claim of discrimination against paternal kindred unless first an order of filiation had been obtained and that such an order was in fact a condition precedent to any inheritance by the alleged father or his relatives.

In the case at bar, as indicated above, no order of filiation was ever obtained during the lifetime of the alleged putative father.

Argument

A

Appellant has failed to raise any substantial question as to the constitutionality of New York's Estates, Powers and Trusts Law, § 4-1.2 subd. (b).

Appellant improperly relies on *Trimble* v. *Gordon,* 430 U.S. 762 (1977), as a basis for her claim in seeking a distributive share of the intestate estate of "decedent" herein.

No matter how the decision of this Court in *Trimble* and the granting of probable jurisdiction by this Court in *Matter of Lalli* (*Lalli II*), 431 U.S. 911 (1976), is perceived, neither of those determinations is controlling or indeed applicable to the situation in the case at bar. While both in *Trimble* and in *Lalli II* this Court was and is concerned with the right of an illegitimate to claim against his putative father, the case at bar deals with a situation where a claim is being made against an illegitimate's estate for the benefit of the alleged putative father's relatives.

There is a substantial difference in "taking from" as opposed to "taking by".

While it is conceivable to apply a standard beyond "rational basis" or "minimal scrutiny" in a situation where the equal protection of an alleged "deprived class" such as an illegitimate is at issue, there is no reason to go

beyond a "rational basis" or "minimal scrutiny" test in a situation where someone is attempting to claim against that alleged class, *i.e.,* as in the case at bar.

In the instant proceeding appellant is not a member of an "illegitimate" or other protected class. Rather the appellant is attempting to take from the illegitimate's intestate estate by her status as an alleged paternal kinsperson. This situation does not constitute that factual setting mandating implementation of a test beyond the "rational basis" of a state in delimiting those who take by their own status. Appellant contends that this delimitation constitutes gender-based discrimination. This is fallacious in that paternal kinspersons are not deprived because of sex or gender and even so this Court has refused to recognize such class as suspect in nature. See: *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). New York must be afforded the right to balance the competing interests of all parties involved in distribution of assets derived from intestate estates. To scrutinize and construe paternal kinspersons as an insular minority invidiously discriminated against by the State of New York is to stretch the veil of the equal protection clause beyond reasonable comprehension.

It is conceded that this Court's scrutiny is not "toothless". However, this Court is not confronted with a factual situation even remotely relating to the latent discrimination alleged by appellant.

B

Even if we assume, *arguendo,* that the standards to be applied in judging a state statute are the same whether we are speaking about inheritance by an illegitimate or inheritance from an illegitimate, the New York State statute at bar is clearly constitutional and does not discriminate.

The determination of this Court in *Labine* v. *Vincent*, 401 U.S. 532 (1971), which left to each state the right to impose statutory restrictions with regard to inheritance by illegitimates, is controlling.

It is respectfully submitted that the Illinois statute declared unconstitutional by this Court in *Trimble* v. *Gordon*, 430 U.S. 762, *supra*, heavily relied on by the appellant herein, and EPTL 4-1.2 are in no way similar. The Illinois statute, § 12 of the Illinois Probate Act, made no provision whatsoever for an illegitimate to inherit from its natural father except under the very limited circumstances of where the natural parents intermarry and where the natural father then acknowledges his parentage of the child. On the other hand, the statute provided that an illegitimate child could inherit from its natural mother.

This Illinois statute did not concern itself with proof of parentage but rather provided for inheritance only from the mother without considering whether an illegitimate child was in fact a natural child of the father and whether such fact could be established.

EPTL § 4-1.2 on the other hand makes no distinction with regard to the right of inheritance of an illegitimate child from its natural mother or father.

EPTL § 4-1.2 does not limit the right of a child to inherit from its natural father and allows that right to exist side by side with the right to inherit from the natural mother.

The distinction in EPTL § 4-1.2 does not deal with the right to inherit but only with the manner in which the parentage itself is established.

There are obvious physiological differences which create by their very nature certain problems in determining whether any given man is the father of a child as opposed to some other man.

This Court in deciding *Trimble, supra,* recognized this fact and acknowledged that "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for legitimate children claiming under their mothers' estates or for legitimate children generally." (430 U.S. 762, 770.) It was this very difficulty which this Court recognized as requiring a more demanding standard for illegitimate children claiming under their fathers' estates which the New York State Legislature is passing EPTL § 4-1.2 considered. The result of the legislators' consideration was the statutory requirement that there be a judicial determination of paternity during the lifetime of the alleged illegitimate's father.

Certainly it is not beyond the scope of legislative province to require a judicial finding of parentage with regard to an alleged putative father during his lifetime so that he might reasonably have an opportunity to contravene the contention of parentage.

This reasonable requirement represents a legitimate legislative purpose to avoid the perpetration of fraud on the People of this state with regard to the disposition of property passing intestate.

The New York Court of Appeals in deciding this case recognized the legitimate purpose of EPTL § 4-1.2 and the fact that this statute did not discriminate or violate the equal protection provisions of either the New York State Constitution or the Constitution of the United States.

It is respectfully submitted that the New York statute in question and the courts of this State have given adequate consideration to the statute's proper objective of assuring accuracy and efficiency in the disposition of property at death, something which apparently was not done by either the Legislature or courts of the state of Illinois and that

the New York statute is, as required by this Court, "carefully tuned to alternative considerations."

In this regard it is important to note that had the appellant in the *Trimble* case, *supra,* been a resident of the State of New York and had she made her claim under the New York statute now before this Court, she could have been successful in establishing her right to inherit. The illegitimate had, in Illinois, obtained an order of the Illinois court during the putative father's lifetime determining paternity and determining which putative father was indeed the father of the illegitimate.

Such an order under EPTL § 4-1.2 would have allowed the illegitimate to inherit from her father since no distinction is made in New York between the right of an illegitimate to inherit from either its mother or father once the paternity of the father is established in a judicial proceeding.

Under the Illinois statute which the Supreme Court of the United States declared unconstitutional, the illegitimate, although judicially determined to be the natural daughter of the putative father, was not entitled to inherit since an illegitimate under Illinois law could only inherit from its natural mother except in one specific case which required two affirmative acts on the natural father's part.

However, a careful reading of the entire opinion of this Court in the *Trimble* case, *supra,* does not lead to the conclusion that a state in the exercise of its right to control the distribution of property by inheritance cannot require a judicial proceeding as the only basis for establishing paternity of an alleged father provided, of course, that once such putative father is so established there is no discrimination with regard to the right to inherit from either the natural mother or father.

The Legislature of this State has determined that for inheritance purposes, a judicial proceeding to determine

paternity be required and such a determination by the Legislature is reasonable and consistent with their legislative function to protect the interests of the citizens of this State.

So long as the legislative requirement with regard to proof is a reasonable one and so long as once the requirements of proof are made there is no discrimination between inheritance from a natural mother or natural father, the statute which provides for the standard of proof must be deemed constitutional.

The Attorney General respectfully urges that this Court's determination in *Trimble* v. *Gordon, supra,* is limited on its facts to the peculiar statute in Illinois declared unconstitutional. Since the Illinois statute bears no relationship to the New York statute which clearly provides a constitutional framework with regard to inheritance by illegitimates, the determination by this Court in the *Trimble* case, *supra,* should not affect the holding of the New York Court of Appeals in the case at bar.

C

EPTL § 4-1.2 was enacted by the Legislature on the basis of the study and recommendation of the Bennett Commission on Estates (4th Report, Temporary State Comm. on the Modernization, Rev. and Simplification of Laws on Estates, N.Y. Legis. Doc. 1965, No. 19, pp. 233-271).

The State has a responsibility to provide for the orderly devolution of property. There would be insurmountable practical problems involved in meaningful notice to illegitimates in order that procedural due process and finality of decrees and title to property might be achieved.

Within the perimeters of *Trimble* v. *Gordon,* this Court recognized that:

> "The orderly disposition of property at death . . . is a matter particularly within the competence of the

> individual States . . . and, even when constitutional violations are alleged, those courts (i.e. federal courts) should accord substantial deference to a State's statutory scheme of inheritance."

Neither the overall decision of this Court in *Trimble, supra* (whether liberally or narrowly read), nor any other pronouncement of this Court, furnishes any authority for the proposition that EPTL § 4-1.2 is unconstitutional.

The New York statute does not contain unequal discrimination between any classes of illegitimates nor are there any insurmountable burdens with regard to its compliance. It is a procedural statute whose purpose is to see that the interests of all of the people of the State are protected with regard to the determination of property ownership.

It emanates from a careful analysis of the practical and procedural problems of illegitimate succession and falls clearly within this Court's mandates set forth in *Labine* v. *Vincent*, 401 U.S. 532 (1971), *supra*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or the judgment affirmed.

Dated: New York, New York
May , 1978

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

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Deceased,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

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Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPELLANT'S REPLY BRIEF

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Responsive Arguments to Appellees' Motions

Appellees, in moving to dismiss or affirm, seek to relitigate the concluded fact of decedent's paternity as a facet of their opposition to unconstitutionality. In contrast, the process of invoking this Court's constitutional jurisdiction brings to the Court decisional finality of decedent's acknowledged paternity as well as the consistent

challenge in the State courts of federal unconstitutionality in EPTL 4-1.2(b). In this unvaried posture of a litigant whose case and controversy rests wholly on substantive federal constitutional grounds, appellant appeals to this Court for constitutional equal protection by invalidation of a state law whose invidious discrimination is directed against her solely because she happens to be a half-sister, having the same father, of the acknowledged illegitimate.

Decedent's birth record is a formal acknowledgment and recognition of paternity on the part of his father and mother, who in their own handwriting designated themselves as his mother and father, and signed the record, witnessed by the civil registrar, in a public register in a public repository, confirmatory of an earlier baptismal record of birth (*Matter of Fay*, 44 N.Y.2d 137, 142). Under Scots law, nothing more was required to acknowledge paternity (Jurisdictional Statement, pp. 4-5, 8). There is no other public document subscribed by decedent's mother acknowledging her maternity and the paternity of the decedent. Grandmother Wetherall-Hunter's attestation as to her son's paternity binds niece-appellees, her descendants.

In *Rudolph* v. *Rudolph*, Ky. App., 556 S.W.2d 152, an illegitimate child whose parentage was not in dispute even though there was no order of filiation claimed the right to inherit from his intestate father, and contended that Kentucky Revised Statute 391.090(2), reading: "A bastard shall inherit only from his mother and his mother's kindred," was unconstitutional.

In the course of its opinion, the Kentucky Court of Appeals made these pertinent observations (556 S.W.2d at pp. 154-155):

> Statutes of other states, similar to our statute here, have been upheld on the basis that they further a state interest in promoting legitimate

family life and strengthening family ties. The state does have a proper interest in promoting such ends, but we fail to see how KRS 391.090(2) can be justified on this basis. In the first place penalizing an infant appears to be a rather dubious and unreasonable method of discouraging his parents from certain conduct before he is even born. Secondly, the Legislature does not appear to have been motivated to preserve or strengthen legitimate family life in enacting this statute since it permits an illegitimate child to inherit from his mother and her kindred. It is unlikely that our lawmakers would intend to encourage the family ties of a father but not those of a mother.

The more likely purpose of this statute, and one found to be the purpose of similar statutes in other states, is to provide for the stability of land titles and the prompt and definitive determination of the ownership of property left by a decedent. *Labine, supra.* In a case in which there is no question of the parentage of a claimant, a statute which intends to provide for the prompt and definitive determination of the ownership of property left by a decedent should have no application. The effect of applying a statute such as ours to that situation denies a claimant inheritance not because his parentage is questionable but simply because he was born out of wedlock. This is the situation here. The appellant in effect has been denied the right to inherit from his father solely because he was born out of wedlock. Such a result is essentially unjust and cannot be grounded in any legitimate interest of the people of Kentucky.

Under our statute a claim of illegitimate filiation, no matter how false, may be made against the estate of a *female*, while a similar claim, no matter how meritorious, is prohibited from being made against the estate of a *male*. This is indeed

> a curious, and we believe unreasonable, method of providing for prompt and definitive determination of title to property. We are well aware that normally it is less difficult to prove a maternal than a paternal relationship, but we are equally aware that in our modern society such is often not the case. In any event, the problem of proof seems more reasonably to address itself to evidentiary standards than to the outright barring of claims. The Legislature is certainly free to enact reasonable legislation to guard against false claims and to require that any claim be made within a period of time which will provide for prompt determination of title to property. (Emphasis supplied.)

The Kentucky Court of Appeals in that case granted appellant the right to inherit from his intestate father and noted that *Trimble* v. *Gordon*, 430 U.S. 762, appeared to support on federal constitutional grounds the result it reached (556 S.W.2d 154, n.1). This was the very statute at issue in *Pendleton* v. *Pendleton*, 431 U.S. 911, wherein this Court vacated the judgment of Kentucky's highest court, its Supreme Court, and remanded in light of *Trimble*. The Kentucky Supreme Court in that case has now struck this statute as unconstitutional (— S.W.2d —, decided October 7, 1977).

Lalli II (43 N.Y.2d 65), in seeking to ease the bite of the *Trimble* holding, professed this Court did not forbid a state from requiring as proof of paternity a judicial determination during the lifetime of the father. This is self-evident from this Court's vacatur, not reversal, of the *Lalli I* judgment (431 U.S. 911; 38 N.Y.2d 77). But, in our view, this Court accepted an order of filiation as *a* method of proving paternity, but not *the* exclusive means of so doing (*Trimble*, 430 U.S. 762, 772, n.14); further this Court heightened the degree of its scrutiny where the factor of illegitimacy was present and lowered the standards of proof to establish paternity. If

proofs are sufficient to establish the paternity of the child, why then are these proofs insufficient to establish the fact of fatherhood?

When appellees say there is a distinction between an illegitimate, and appellant, arguing there is no question of discrimination against an illegitimate involved here, they disregard the whole impact motive of the single discriminatory word—ILLEGITIMATE—as the same has been applied to appellant. Were it not for the application to her by the statute and the State court of this inimical, unredemptive word, which they specifically direct against her because she is in consanguinity with her father, appellant would not be before this Court on this appeal. They stand on the single proposition of across-the-board disenfranchisement in illegitimacy of all paternal kindred with no distinction between appellant and her deceased half-brother.

The Commission's recommendation, in these general words—"*However*, no kindred of the father may represent him to take from the estate of the *recognized* illegitimate" (Appendix G, p. G-4, 1st full par., last sentence; emphasis supplied)—is the sole statement in the Report for statutory exclusion of paternal kindred. On this isolated attenuated afterthought of a sentence, the Legislature, in shapeless innovation, contained all paternal kindred within the bars of a despised category of illegitimate representation. Here then is even-handed statutory distribution of equality in illegitimacy with the decedent to all those in consanguinity with the illegitmate's father.

The State court's basic rationale for justifying their discriminatory exclusion of paternal kindred from intestate inheritance, even were there an order of filiation, lies in the court's heavily weighted reliance on a judgment, merely legislative, drawn from the Commission's Report, which rests on assumptions and dogmas of rele-

vancy stemming from an ancient enclave mentality discriminately indispositioned towards illegitimates and their fathers.

Aliusque et idem. Though appellant be another, according to the State court, she is the illegitimate: a surrogate in illegitimacy for her half-brother.

Neither decedent nor appellant should shoulder the brunt of his illegitimacy where others, marked but unaffected by this stigma, and equally circumstanced, share his estate in intestacy (See, Professor Rohan's Supplementary Practice Commentary, pp. 103-104, 17B, McKinney's Consolidated Laws of New York, Cumulative Annual Pocket Part, for use in 1977-1978).

In contrast to the views of the State court concerning the legislative purpose of the law, many nations have joined together in convention to bring a new *legal* light to the blight of illegitimacy;[1] and various state courts, in increasing numbers, are re-evaluating and remolding, along constitutional lines, their previous positions concerning inheritance from, by and through illegitimates.

Notwithstanding an ongoing national[2] and international *legal* upheaval in intestate succession involving considera-

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[1] European Convention on the Legal Status of Children Born out of Wedlock, Strasbourg, October 15, 1975. Articles 3 and 9 provide: (3) "Paternal affiliation of every child born out of wedlock may be evidenced or established by voluntary recognition or by judicial decision;" (9): "A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock." The Convention is in force; the latest nation to ratify it is Switzerland, on May 10, 1978.

[2] At latest count, eleven states now recognize inheritance from, by and through an illegitimate.

tions of illegitimacy, New York's highest court discerns equal protection in EPTL 4-1.2(b). In our view EPTL 4-1.2 is a wrong-side-of-the-track statute, unmistakably and manifestly directed toward depriving paternal kindred and illegitimates of their inheritances solely on a gender-based divisor of an unwed father.

The questions for determination here are not predicated on the presence or absence of direct discrimination against the illegitimate, but rather on whether EPTL 4-1.2(b) is constitutional because of its positive and direct discrimination against appellant, who is denied the same protection as maternal kindred, because appellant is in consanguinity with her acknowledged illegitimate brother, of the same father.

The principle evoked by this appeal does not rest on a plea for reciprocity but for equal protection in recognition of the parity granted appellant as an equally-circumstanced distributee with appellees in EPTL 4-1.1, the general statute of intestate distribution, released from the unconstitutional statutory attribution of disentitlement in illegitimacy.

At this point, appellant parallels her arguments with a similar case wherein the stigmatizing factor of gender-based discrimination was found unconstitutional. In *Matter of Brooks*, #33,535 of the District Court of Lea County, New Mexico, affirmed in a decree-unreported opinion of the Supreme Court of New Mexico, — New Mex. —, dated October 21, 1975, this Court, sub. nom. *Schanefelt* v. *Paradiso*, vacated and remanded the case to the New Mexico Supreme Court "for further consideration in light of *Califano* v. *Goldfarb*, 430 U.S. .... (1977) and *Trimble* v. *Gordon*, 430 U.S. .... [1977]" (431 U.S. 911).

Lucy Brooks' Will, naming her executor sole legatee, was admitted to probate on his application alleging that decedent left no relatives by consanguinity.

Appellant Schanefelt challenged the validity of the Will, alleging she, her brother and nephew, were all the distributees of decedent's predeceased husband and claimed, therefore, that they were the only blood relatives of said predeceased husband and, accordingly, were the decedent's distributees under 53 N.M.S.A., Sec. 29-1-15, which read at decedent's death on March 27, 1973:

> Inheritance by heirs of wife.
>
> If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation.

Appellee Paradiso contended said section applied solely to inheritance by heirs of a predeceased wife and not to heirs of a predeceased husband. Appellant Schanefelt claimed the section should grant inheritance to distributees of a predeceased husband or, otherwise, was unconstitutional under the Equal Protection Clause of the United States Constitution.

The District Court granted appellee's motion to dismiss appellant's petition, as amended, holding that appellant was not a distributee of decedent.

On appeal to the Supreme Court of New Mexico, appellant repeated her contention that the statute was unconstitutional "if not applied to the heirs of a predeceased husband." The New Mexico Supreme Court affirmed the District Court's order granting appellee's motion to dismiss on the ground appellant was not a distributee of decedent.

Appellant appealed to this Court on the question (in her Jurisdictional Statement) whether

> Equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States requires application of 53 N.M.S.A., Sec. 29-1-15 to heirs of deceased husbands as well as to heirs of deceased wives. (Jurisdictional Statement, p. 5)

As noted, this Court *summarily* vacated the judgment of the New Mexico Supreme Court on May 16, 1977, the same day it *summarily* vacated the judgment in *Matter of Lalli*, 38 N.Y.2d 77 (431 U.S. 911).

Significant here is this Court's citation of *Califano* v. *Goldfarb*, 430 U.S. 199, in its vacatur of the *Brooks* judgment. At the very least, the implication is clear that similarly situated kindred may not be treated differently because of the sex of a decedent's parents, where inheritance *from* an intestate is involved.

Assuming that classifications based on illegitimacy trigger a heightened level of scrutiny, and assuming further that the goal is equality of status and treatment, this Court, consistent with the Equal Protection Clause, respectfully is requested to resolve the distinction, contrived in our view, between paternal and maternal kindred insofar as intestate succession is concerned.

The arguments offered by appellees in opposition are tenuous, insubstantial and inappropriately applied to appellant's claim of jurisdiction in the Supreme Court of the United States to entertain this appeal. Moreover, counsel are of the considered opinion that the summary dispositions in *Pendleton* and *Schanefelt*, in light of *Trimble*, warrant this Court's further consideration whether summary disposition by reversal and remand is justified in this case.

CONCLUSION

Appellant respectfully submits the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

Dated: May 31, 1978

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of JOHN PATRICK FAY, also known as JOHN P. FAY, *Deceased*,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF

Statement

Appellant's jurisdictional statement, docketed April 27, 1978, and her reply brief, docketed May 31, 1978, are pending. This Court decided *Lalli* v. *Lalli* (No. 77-1115) on December 11, 1978. *Lalli*, as a new case, is an intervening matter which was not available to appellant.

In counsel's view, the determinative dissimilarities between *Lalli* and this appeal in important constitutional respects could not have been previously articulated with propriety while *Lalli* was pending before this Court. In conformance with Rule 16, par. 5 of this Court's rules, appellant files this supplemental brief to effectuate what could not have been done previously.

In this supplemental brief counsel differentiate, in substance, the facts of this appeal from those in *Lalli* and are of the considered opinion that neither the holding nor the rationale of *Lalli* along constitutional lines in an intestate succession matter have any application here.

I

The statutory out-of-state joint acknowledgment of paternity here satisfies the state's interests in the accurate and orderly settlement of estates

In *Lalli*, all significant contacts were with New York local law: the child, his mother, and the decedent, his father, were New York residents at his birth in 1948, and at her death in 1968. Child and father continued to be New York residents until the father's death in 1974.

Here, in *Fay*, the decedent was the illegitimate. He was born in Scotland, where his parents then resided, in 1892. His father died in 1915, his mother in 1932: neither parent ever came to New York. Decedent established a New York domicile after their deaths which he maintained until his demise in 1970.

The birth certificate of Fay, the decedent illegitimate, was executed in precise compliance with the Scottish statutorily-prescribed procedures for the acknowledgment of paternity of an illegitimate (Jurisdictional Statement, pp. 4-5, 8). The birth certificate is a contemporaneous

public record of a joint voluntary acknowledgment and recognition of paternity on the part of Fay's father and mother, who, in their own handwritings, designated themselves as "Father" and "Mother" and signed their names, witnessed by the Scots civil registrar (Jurisdictional Statement, Appendix F): the original record as of the day of this appeal was then and still is believed to be lodged with the Scots civil registrar. *This imperishable document of decedent's birth and paternity is the cornerstone of appellees' case.* Their grandmother's joint acknowledgment of her son's maternity secured their right to inherit from him. We perceive no reason why their grandmother's attestation as to her son's paternity should not bind appellees and secure appellant's right to inherit from him.

In summary, the Scottish appellate judge in *Alexander* v. *Alexander*, [1920] S.C. 327 at 331-332 is paraphrased to say for appellant on this appeal: it seems to us that this was a complete recognition by Fay's father of his paternity. If he had believed that decedent was not his own but that of another man, it is not conceivable that he should have taken for its registered name his own name. We cannot regard what was then done as being anything other than a solemn declaration by Fay's father that the decedent was his child.

A

New York's interests will not be jeopardized by accepting Fay's out-of-state birth record as evidence of the formal acknowledgment of paternity by his father and mother.

The *Trimble* holding

> . . . goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity (*Trimble*, 430 U.S., at 772 n.14).

The *Lalli* plurality reiterated *Trimble's* holding that there was no restriction on a State's freedom to require proof of paternity by means other than a judicial decree, saying

> Thus a State may prescribe any *formal* method of proof, whether it be similar to that provided by § 4-1.2 or some other regularized procedure that would assure the authenticity of the acknowledgment. As we noted in *Trimble*, 430 U.S., at 772 n.14, such a procedure would be sufficient to satisfy the State's interests (*Lalli*, Slip op., at 12 n.8; emphasis in original).

In *Lalli*, Mr. Justice Powell explained *Trimble's* "formal acknowledgment" to mean ". . . such as would minimize post-death litigation, i.e., a regularly prescribed, legally recognized method of acknowledging paternity" (*Lalli*, Slip op., at 15 n.11).

Acceptance by this Court of foreign formal acknowledgments of paternity as alternatives to judicial orders of filiation is, at the least, recognition of state extrajudicial formal paternity acknowledgment procedures giving cognizance to the 20 states which, by legislative enactments, now subscribe to such procedures, but not with unanimity as to the evidentiary criteria to establish a formal acknowledgment. In all events, the criteria set up by Mr. Justice Powell in *Lalli* (Slip op., at 15 n.11) were fully met by decedent's parents in their precise compliance with the provisions of the Scottish legislative act.

Extrajudicial forms of formal paternity acknowledgment have been accepted by New York courts (*Matter of Ortiz*, 86 Misc. 2d 790; *Matter of Sherman*, 76 Misc. 2d 551; *Matter of Ortiz*, 60 Misc. 2d 756; *Matter of Slater*, 195 Misc. 713) as a matter of comity (*Ortiz, supra*, 60 Misc. 2d at 762).

We note that the Bennett Commission did recommend to the New York Legislature that nothing less than a judicial order of filiation made in foreign jurisdictions be recognized as valid in New York to establish paternity (Jurisdictional Statement, Appendix G-2, G-6). The Legislature did not adopt the recommendation.

Professor Samuel Hoffmann, the "chief architect of the EPTL" (17B McKinney, Estates, Powers and Trusts Law, 1-1.1 to 5-4.5, at page IV), who prepared the practice commentary to 4-1.2, did not view 4-1.2 as requiring a judicial order of filiation for an illegitimate, born out-of-state, to inherit in New York (*op. cit.*, at p. 534). He and the Commission (Jurisdictional Statement, Appendix G-4, G-6), were addressing themselves to local orders of filiation for illegitimates and not to foreign acknowledgments. It would, at the least, be anomalous if the Legislature's intention were to be inferred from the general language of an Act to give it extraterritorial effect (*Ewens* v. *Thompson*, 208 N. Y. 245 at 247).

Since the illegitimate here is the decedent, it is not relevant to discuss particular procedural problems or possible spurious claims in areas where the illegitimate is other than the decedent.

In our view, and we are committed to the proposition, there is now a constitutional rule which has emanated from this Court requiring New York, in a case of this type, to accept an out-of-state *formal* acknowledgment of paternity as an alternative to a judicial order of filiation in proof of paternity.

Fay's Scottish birth certificate, jointly executed by his parents for the purpose of recording his birth and proving biological paternity in precise legal conformity to legislative prescription, satisfies the primary state goal to provide for the just, accurate and orderly disposition of the decedent illegitimate Fay's intestate property.

B

New York, Fay's domicile at death, governs the distribution of his intestate personal estate (EPTL 3-5.1, subd. b, par. 2; *Matter of McGlone*, 284 N.Y. 527, affd. sub nom. *Irving Trust Co.* v. *Day*, 314 U.S. 556; *Matter of Gifford*, 279 N.Y. 470).

The evidentiary fact that appellant had to and did establish was her brother Fay's paternity according to the Scottish statute, and nothing more (*Olmsted* v. *Olmsted*, 190 N.Y. 458, affd. 216 U.S. 386; *Miller* v. *Miller*, 91 N.Y. 315; *Matter of Ortiz*, 60 Misc. 2d 756, 763).

The right to inherit at Fay's domicile of origin is not a predicate to his appellant-sister's right to inherit at her brother's domicile of intestate distribution (*Lalli* v. *Lalli*, Slip op., at 7; *Matter of Lalli*, 43 N.Y. 2d at 68 and n.2). Had the *Labine* child been governed by 4-1.2, she would have been a distributee of her father's estate. See, 2 Restatement of Confl. of Laws 2d, § 288, comment (d), p. 262.

II

The state court has imposed an arbitrary and unconstitutional precondition for inheritance from an illegitimate by paternal kindred in contravention of state policy by an unconstitutional assumption of legislative power to speak and act for the state legislature's silence on the subject of recognition of foreign statutory acknowledgments of paternity

A

New York State policy is "to alleviate the plight of the illegitimate child" (*Lalli*, Slip op., at 10).

The New York Legislature desired to "grant to illegitimates *in so far as practicable* rights of inheritance on

a par with those enjoyed by legitimate children" (*Lalli*, Slip op., at 14; emphasis added by the Court).

B

The *Lalli* State Court understood *Labine* (*Labine* v. *Vincent*, 401 U.S. 532) to require the State to show no more than that "there is a rational basis for *the means chosen by the Legislature* for the accomplishment of a permissible State objective" (*Matter of Lalli*, 38 N.Y. 2d at 81; emphasis added).

In the *Fay* fact pattern, no means were chosen by the Legislature for the establishment of the evidentiary fact of paternity, where inheritance *from* the decedent illegitimate was claimed by maternal and paternal kindred (EPTL 4-1.2[b]).

Moreover, the Legislature rejected the Bennett Commission recommendation that recognition be given to foreign acknowledgments of paternity only if they took the form of judicial orders of filiation (*supra*, p. 5).

Nevertheless, the State Court of Appeals assumed:

> . . . if in the absence of an order of filiation an illegitimate child may constitutionally be precluded from inheriting from his father, it is beyond reproach to preclude, in the absence of a filiation order, inheritance by the paternal kindred of an illegitimate (*Matter of Fay*, 44 N.Y. 2d at 144).

This assumption led the State Court to hold that "the preclusion of inheritance by the paternal kindred of an illegitimate, at least where there has been no order of filiation, is not violative of equal protection (*Fay*, *supra*, at 144).

The conclusion of the State Court is non-syllogistic because the decedent is the illegitimate and his out-of-

state paternity has been authenticated in a manner mandated by foreign legislative enactment. The State Court's conclusion conflicts with State policy and is an unconstitutional encroachment on the State Legislature's statutory preserve to enact laws for the regulation of intestate succession. It is not the function of the highest state court "to hypothesize independently" and to implant, solely by its fiat, the requirement of a judicial order of filiation as a prerequisite to recognition of a foreign formal acknowledgment, into the statutory scheme formulated by the New York Legislature (*Lalli*, Slip op., at 14; *Matthews* v. *Lucas*, 427 U.S., at 515; Jurisdictional Statement, at 15). Judicial preferment may not ignore legislative rejection.

The State Court here has not at all considered that a foreign formal acknowledgment of paternity would in any way compromise the State's interests in the orderly settlement of a decedent illegitimate's intestate estate. The State Court's judicial imposition of a requirement of an order of filiation as the *exclusive* means of establishing paternity where the decedent illegitimate's paternity has been formalized and authenticated in a foreign forum in strict compliance with its legislative mandate, an alternative form of paternity proof acceptable to this Court (*Trimble*, 430 U.S., at 772 n.14; *Lalli*, Slip op., at 12 n.8 and 14-15 n.11), does not pass constitutional muster (*Zablocki* v. *Redhail*, 434 U.S. 396, 400-401 [Powell, J. concurring]; *Oregon* v. *Hass*, 420 U.S. 714, 719).

The discrimination against illegitimates remains apparent and is, indeed, enlarged on by the State's highest court. In the facts of this case, there is no deference due to a state court where the means it has selected preempts the acceptance of a "carefully tuned," constitutionally-sanction alternative. *In sum, the effect of applying a statute enacted by the State Court to this situation denies claimant-appellant her inheritance not because her brother's paternity is questionable but simply because he was born out of wedlock.*

III

EPTL 4-1.2, as applied to appellant in the facts and circumstances of this appeal, unconstitutionally discriminates against her on the basis of sex and inequality of treatment

The issues of unconstitutional sex-based discrimination and unequal treatment of persons similarly-circumstanced in the state intestate distribution statute were raised in and considered by the state courts and now are properly before this Court for determination.

The challenge to EPTL 4-1.2, premised on unconstitutional sex-based discrimination and inequality of treatment, is fully detailed and comprehensively briefed in appellant's jurisdictional statement, in subsection (c) entitled "Unconstitutional Unequal Application of EPTL 4-1.2(b)," at pp. 16-24, and is enlarged upon in further argument throughout appellant's reply brief.

Counsel rest their challenge to unconstitutional sex-based discrimination and inequality of treatment on the arguments found therein.

To prevent "unnecessary injustice" (*Lalli*, Slip op., at 14), to give "authoritative guidelines to the courts and legislatures of the several states" (*Lalli*, Stewart, J., concurring), to obviate the need for statute-by-statute determination of validity by this Court (*Lalli*, Blackmun, J., concurring), and to demonstrate that there has been no "retreat" from *Trimble* (*Lalli*, Brennan, J., dissenting), the Court is respectfully requested to accept this appeal and to grant a plenary hearing.

Conclusion

Appellant respectfully submits the Supreme Court of the United States has jurisdiction of this appeal.

Dated: December 29, 1978.

Respectfully submitted,

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